No. 17-7505 *** CAPITAL CASE ***	
Title:	**Vernon Madison, Petitioner** **v.** **Alabama**
Docketed:	January 19, 2018
Linked with 17A770	
Lower Ct:	Circuit Court of Alabama, Mobile County
Case Numbers:	(CC-1985-001385.80)
Decision Date:	January 16, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jan 18 2018	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due February 20, 2018) **Petition** **Appendix** **Motion for Leave to Proceed in Forma Pauperis** **Proof of Service** **Other**
Jan 19 2018	Brief of respondent State of Alabama in opposition filed. **Main Document**
Jan 22 2018	Application (17A770) for a stay of execution of sentence of death, submitted to Justice Thomas. **Main Document** **Proof of Service**
Jan 22 2018	Response to application from respondent State of Alabama filed. **Main Document**
Jan 22 2018	Reply of petitioner Vernon Madison filed. **Main Document** **Proof of Service**
Jan 25 2018	UPON CONSIDERATION of the application of counsel for the applicant, IT IS ORDERED that execution of the sentence of death is hereby stayed pending further order of Justice Thomas or of the Court.
Jan 25 2018	Application (17A770) referred to the Court.
Jan 25 2018	Application (17A770) granted by the Court. The application for stay of execution of sentence of death presented to Justice Thomas and by him referred to the Court is granted pending the disposition of the petition for a writ of certiorari.

	Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court. Justice Thomas, Justice Alito, and Justice Gorsuch would deny the application.
Feb 01 2018	DISTRIBUTED for Conference of 2/16/2018.
Feb 20 2018	DISTRIBUTED for Conference of 2/23/2018.
Feb 26 2018	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Mar 15 2018	Joint motion for an extension of time file the briefs on the merits. **Main Document** **Proof of Service**
Mar 27 2018	Joint motion to extend the time to file the briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 22, 2018. The time to file respondent's brief on the merits is extended to and including July 31, 2018.
May 10 2018	Motion to dispense with printing the joint appendix filed by petitioner Vernon Madison. **Main Document** **Proof of Service**
May 18 2018	Blanket Consent filed by Respondent, Alabama **Blanket Consent**
May 21 2018	Blanket Consent filed by Petitioner, Vernon Madison **Blanket Consent** **Proof of Service**
May 22 2018	Brief of petitioner Vernon Madison filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 29 2018	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
May 29 2018	Brief amici curiae of American Psychological Association and American Psychiatric Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 09 2018	SET FOR ARGUMENT On Tuesday, October 2, 2018
Jul 31 2018	Brief of respondent State of Alabama filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 03 2018	CIRCULATED

Aug 07 2018	Record requested from the Circuit Court of Alabama, Mobile County.
Aug 07 2018	Brief amici curiae of States of Texas, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 07 2018	Brief amicus curiae of National Association of Police Organizations filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 14 2018	Record received from the Court of Criminal Appeals State of Alabama. The record is electronic.
Aug 16 2018	Record received from the Circuit Court of Alabama, Mobile County. The record is electronic.
Aug 17 2018	Record received from the Circuit Court of Alabama, Mobile County. 1 envelope.
Aug 24 2018	Record received from the Circuit Court of Mobile Alabama (additional material).
Aug 30 2018	Reply of petitioner Vernon Madison filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 02 2018	Argued. For petitioner: Bryan A. Stevenson, Montgomery, Ala. For respondent: Thomas R. Govan, Jr., Alabama Deputy Attorney General, Montgomery, Ala.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

VERNON MADISON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MOBILE COUNTY CIRCUIT COURT

PETITION FOR A WRIT OF CERTIORARI

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January 18, 2018

CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR JANUARY 25, 2018

CAPITAL CASE

QUESTION PRESENTED

On **January 25, 2018**, the State seeks for the second time to execute Vernon Madison, a 67-year-old man who has been on Alabama's death row for over 30 years. Mr. Madison suffers from vascular dementia as a result of multiple serious strokes in the last two years, and no longer has a memory of the commission of the crime for which he is to be executed. His mind and body are failing: he suffers from encephalomacia (dead brain tissue), small vessel ischemia, speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain.

The first time Mr. Madison was scheduled to be executed by the State of Alabama, in May, 2016, he challenged his competency in the state circuit court pursuant to the Alabama statute governing competency-to-be-executed claims. After the circuit court denied his claim, Alabama law prohibited any appeal in state court, and Mr. Madison challenged his claim in federal court. In granting habeas corpus relief, the Eleventh Circuit majority found that the evidence undisputably established that Mr. Madison had no memory of the offense, and all three judges, including the dissenting judge, agreed that he was incompetent

to be executed.[1]

This Court reversed the Eleventh Circuit's grant of habeas corpus relief and explicitly declined to address the "merits of the underlying question outside of the AEDPA context," Dunn v. Madison, 138 S. Ct. 9, 12 (2017), as that question was not "[a]ppropriately presented." Id. (Ginsburg, J., concurring).

With this Court's opinion in hand, the State sought an expedited execution date, and Mr. Madison's execution was scheduled for January 25, 2018. Mr. Madison once again petitioned the Mobile County Circuit Court for relief under the same statutory provision, this time with new evidence that the court-appointed expert, Dr. Karl Kirkland, whose report the circuit court and this Court had previously relied on in denying Mr. Madison's claim, had been suspended from the practice of psychology after his narcotics addiction led him to forge prescriptions for illegal pills (including one incident occurring just 4 days after Mr. Madison's 2016 competency hearing) and eventually into drug rehab. Though the State never disclosed these facts to any court – the circuit court, the Alabama Supreme Court[2] or this Court – while at the same time arguing for

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[1] See Madison v. Comm'r, Ala. Dep't Of Corr., 851 F.3d 1173, 1190 (11th Cir. 2017) ("We therefore conclude that Mr. Madison is incompetent to be executed."); id. (Jordan, J., dissenting) ("I believe that Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him . . . .").

[2] See, e.g., State of Alabama's Expedited Motion to Set an Execution Date at 2, Ex parte Madison (In re Madison v. State), No. 1961635 (Ala. Nov. 8, 2017).

reliance on Dr. Kirkland to deny Mr. Madison's claim, the circuit court again denied relief after a brief hearing and finding that Mr. Madison was competent to be executed. See Appendix A.

With no available appeal in the Alabama state courts, Mr. Madison is again before this Court, this time "outside of the AEDPA context," requesting that his execution be stayed and certiorari be granted to address the following two substantial questions:

1. Consistent with the Eighth Amendment, and this Court's decisions in Ford and Panetti, may the State execute a prisoner whose mental disability leaves him without memory of his commission of the capital offense? See Dunn v. Madison, 138 S. Ct. 9, 12 (Nov. 6, 2017) (Ginsburg, J., with Breyer, J., and Sotomayor, J., concurring).

2. Do evolving standards of decency and the Eighth Amendment's prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes causing severe cognitive dysfunction and a degenerative medical condition which prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution?

("there are no further impediments to the execution of Madison's lawful sentence").

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INTRODUCTION

On **January 25, 2018**, the State seeks for the second time to execute Vernon Madison, a 67-year-old man who has been on Alabama's death row for over 30 years. Prior to his scheduled execution date in May, 2016, Vernon Madison presented evidence to the Mobile County Circuit Court establishing that in January, 2016, he suffered a thalamic stroke, which, along with several previous severe strokes, led to significant decline in his cognitive and bodily functioning. He now speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain. These strokes led to an unrebutted DSM-5 diagnosis of vascular neurological disorder, or vascular dementia. It is undisputed that as a result of this debilitating condition, Mr. Madison has no memory of the capital offense for which he is to be executed.

In the nineteen months since that evidence was presented, Mr. Madison has continued to suffer from vascular dementia, a degenerative disease which is both irreversible and progressive, as well as physical and cognitive decline. And, evidence has emerged that the court-appointed psychologist who determined Mr. Madison to be competent and on whom both the circuit court and this Court relied was suffering from a substance addiction disorder at the time of his evaluation of Mr. Madison, which ultimately led to four (4) felony charges related to illegally obtaining controlled substances and suspension from

the practice of psychology.

On this basis, Mr. Madison again requested that the Mobile County Circuit Court find him incompetent to be executed and stay the execution scheduled for **January 25, 2018**. After a brief hearing, Mr. Madison's petition was denied on January 16, 2018. Alabama law does not allow for an appeal.

The evidence presented to the court below about Mr. Madison's mental condition is not in dispute: Mr. Madison suffers from vascular dementia as a result of multiple, severe strokes and has no memory of the offense for which the State seeks to execute him. Nor is there much dispute about the fact that the only expert to find him competent has now been rendered not credible by virtue of his substance abuse addiction, felony charges, license suspension and entry into rehab. Given the undisputed nature of the evidence, this case presents this Court with the appropriate vehicle to consider the substantial question of whether the execution of a prisoner with no memory of the underlying offense is consistent with the evolving standards of decency inherent in this Court's Eighth Amendment jurisprudence.

STATEMENT OF JURISDICTION

On January 16, 2018, the Mobile County Circuit Court denied Mr. Madison's petition to suspend his execution because he is incompetent to be executed, filed pursuant to Alabama Code § 15-16-23. (Order of Mobile County Circuit Court dated January 16, 2018, attached as Appendix A). Section 15-16-23

provides that the trial court's decision "shall be exclusive and final and shall not be reviewed or revised by or renewed before any other court or judge." See also Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995) (dismissing appeal of competency-to-be-executed determination because "[t]he statute clearly states that a finding by the trial court on the issue of insanity, as it relates to this statute, is not reviewable by any other court"); Magwood v. State, 449 So. 2d 1267, 1268 (Ala. Crim. App. 1984) ("The trial court's entered order was conclusive. Neither our court nor the Supreme Court has jurisdiction over this matter."); Madison v. Comm'r, Ala. Dep't of Corr., 851 F.3d 1173, 1183 n.8 (11th Cir. 2017) ("Section 15-16-23 . . . explicitly precludes review by any other judge or court."). The Mobile County Circuit Court is the "highest court of [Alabama] in which a decision could be had," and jurisdiction is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOKED

The Eighth Amendment to the United States Constitution provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Prior Proceedings

Vernon Madison was indicted on two counts of capital murder on May 20, 1985, in the Mobile County Circuit Court in Mobile, Alabama. Madison v. State, 620 So. 2d 62, 62 (Ala. Crim. App. 1992). The charges arose from the death of City of Mobile police officer Julius Schulte on April 18, 1985. Id. at 63-64. On September 12, 1985, a jury found Mr. Madison guilty of capital murder, and the trial court subsequently sentenced him to death. Id. at 63. The Alabama Court of Criminal Appeals reversed Mr. Madison's conviction and sentence after concluding that the Mobile County District Attorney's Office had engaged in racially discriminatory jury selection when it struck all seven qualified African American veniremembers, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Madison v. State, 545 So. 2d 94, 95-99 (Ala. Crim. App. 1987).

At the second trial, Mr. Madison did not deny shooting the victim; rather, his primary defense was that he was not guilty by reason of mental disease or defect. Madison, 620 So. 2d at 65. On September 14, 1990, Mr. Madison was again convicted of capital murder, and the trial court imposed a sentence of

death. Madison, 620 So. 2d at 63. The Alabama Court of Criminal Appeals reversed on the ground that the State had engaged in prosecutorial misconduct when it elicited expert testimony "based partly on facts not in evidence," in violation of Ex parte Wesley, 575 So. 2d 127 (Ala. 1990). Madison, 620 So. 2d at 73.

Mr. Madison's third trial was held from April 18, 1994, through April 21, 1994. At the guilt phase of trial, Mr. Madison again did not deny that he shot the victim, but claimed that he did so in self-defense. Madison v. State, 718 So. 2d 90, 97 (Ala. Crim. App. 1997). On April 21, 1994, the jury found Mr. Madison guilty of capital murder. It was undisputed at the penalty phase of trial that Mr. Madison suffered from a mental illness marked by paranoid delusions. This mitigating circumstance was established primarily through the testimony of defense expert Dr. Barry C. Amyx. (Pet. Ex. 5 at 714-55.) Dr. Amyx testified that Mr. Madison suffered from a delusional disorder; had experienced persecution delusions since he was a teenager; was out of touch with reality and unable to gather his thoughts; and could not appreciate fully the criminality of his conduct. (Pet. Ex. 5 at 718, 720, 724, 727, 736, 754.) Dr. Amyx explained that Mr. Madison's struggles with mental illness had been observed since he was an adolescent, including by prison psychiatrists in Mississippi as documented in medical records introduced by the defense. (Pet. Ex. 5 at 718.) To control his illness, Mr. Madison had been prescribed numerous anti-psychotic medications.

(Pet. Ex. 5 at 721.)

Although the State called psychiatric expert Dr. Claude Brown to contest the *severity* of Mr. Madison's impairment, Dr. Brown agreed that Mr. Madison suffered from a mental illness "of a paranoid type." (Pet. Ex. 6 at 767, 770.) Dr. Brown did not refute the defense evidence that Mr. Madison had been diagnosed as mentally ill years earlier by prison psychiatrists in Mississippi or that he was required to take numerous psychotropic medications. (Pet. Ex. 6 at 767-770.)

After hearing this significant evidence concerning Mr. Madison's profound history of mental illness, the same death-qualified jury voted to sentence Mr. Madison to life imprisonment without parole. On July 7, 1994, Judge Ferrill McRae[3] overrode the jury's verdict and sentenced Mr. Madison to death. Mr. Madison's case was affirmed on appeal, Madison v. State, 718 So. 2d 90 (Ala. Crim. App. 1997), aff'd, Ex parte Madison, 718 So. 2d 104 (Ala. 1998), and this Court denied certiorari review, Madison v. Alabama, 525 U.S. 1006 (1998).

Mr. Madison subsequently filed a petition for post-conviction relief

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[3] In his time on the bench, Judge McRae overrode six life verdicts, more than any other judge in the state of Alabama. See Woodward v. Alabama, 134 S. Ct. 405, 409 (2013) (Sotomayor, J., dissenting) ("One Alabama judge, who has overridden jury verdicts to impose the death penalty on six occasions, campaigned by running several advertisements voicing his support for capital punishment. One of these ads boasted that he had 'presided over more than 9,000 cases, including some of the most heinous murder trials in our history,' and expressly named some of the defendants whom he had sentenced to death, in at least one case over a jury's contrary judgment." (citing Equal Justice Initiative, The Death Penalty in Alabama: Judge Override 16 (2011), http://eji.org/eji/files/Override_Report.pdf).

pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The Alabama Court of Criminal Appeals affirmed the dismissal of that petition without a hearing, Madison v. State, 999 So. 2d 561 (Ala. Crim. App. 2006), and the Alabama Supreme Court denied certiorari review.

On January 8, 2009, Mr. Madison timely filed his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. The district court denied relief, but the United States Court of Appeals for the Eleventh Circuit reversed the district court's denial in part on April 27, 2012, and remanded the case with instructions for the district court to conduct a Batson hearing. Madison v. Comm'r, Ala. Dep't of Corr., 677 F.3d 1333 (11th Cir. 2012). The State appealed that remand order to this Court, and the Court denied the State's Petition for Writ of Certiorari on November 13, 2012. Thomas v. Madison, 568 U.S. 1019 (2012). On April 25, 2013, the district court again denied Mr. Madison's petition for habeas corpus relief, and the United States Court of Appeals for the Eleventh Circuit affirmed that denial on August 4, 2014. Madison v. Comm'r, Ala. Dep't of Corr., 761 F.3d 1240 (11th Cir. 2014). This Court denied certiorari review on March 23, 2015. Madison v. Thomas, 135 S. Ct. 1562 (2015). This Court denied Mr. Madison's petition for rehearing on May 18, 2015. Madison v. Thomas, 135 S. Ct. 2346 (2015).

B. Facts Pertinent to Mr. Madison's Competency to Be Executed and How the Federal Question was Addressed Below.

On January 22, 2016, the State of Alabama moved the Alabama Supreme Court to set an execution date for Mr. Madison. On February 12, 2016, before the Alabama Supreme Court scheduled the execution, Mr. Madison's counsel filed a petition in the Mobile County Circuit Court pursuant to Alabama Code § 15-16-23, moving the trial court to stay Mr. Madison's execution because, as a result of severe multiple strokes in May 2015 and January 2016, Mr. Madison suffered significant physical and cognitive decline and had no memory of the commission of the capital offense for which he was scheduled to be executed.

On February 15, 2016, Mr. Madison's counsel moved the Alabama Supreme Court to delay setting an execution date until after Mr. Madison's competency claim had been adjudicated. Nevertheless, on March 3, 2016, the Supreme Court of Alabama ordered that Thursday, May 12, 2016, be set as the date for Mr. Madison's execution.

On March 15, 2016, the Mobile County Circuit Court judge determined that Mr. Madison had made a preliminary showing of incompetency, ordered that he be evaluated by a court-appointed expert, Dr. Karl Kirkland,[4] and scheduled a hearing on Mr. Madison's petition, which occurred on April 14,

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[4] At the time of the hearing, Dr. Karl Kirkland had a long-standing contract with the State of Alabama. (Hr'g R. 13.)

2016.[5]

At the hearing, the unrebutted evidence established that Mr. Madison suffers from a major vascular neurological disorder, see Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 621 (5th ed. 2014) (hereinafter "DSM-5"), or vascular dementia, which was caused in part by a thalamic stroke he suffered in January 2016. (Hr'g R. 46-47, 52 .) Dr. John Goff, a licensed neuropsychologist who, at Mr. Madison's request, conducted extensive neuropsychological testing and evaluated Mr. Madison's competence to be executed, determined that Mr. Madison's cognitive and bodily functioning has declined significantly as a result of several strokes he has suffered over the past couple of years, as well as other medical conditions with which he is afflicted. (Hr'g R. 50, 53-54; Pet. Ex. 2 at 8.)

On January 4, 2016, Mr. Madison was found unresponsive in his prison cell and fecally incontinent after suffering a thalamic stroke,[6] which necessitated transfer from Holman Prison and outside hospitalization. (Pet. Ex. 7, Vol. 5, at 24; Pet. Ex. 10 at 12.) This thalamic stroke is particularly relevant to Mr.

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[5] The record of this first competency proceeding, including all evidence submitted and considered by the circuit court, see Madison v. State, No. CC-1985-1385.80 (Mobile Cnty. Cir. Ct.) was specifically incorporated into the current record. See Petition Pursuant to Alabama Code §15-16-23 to Suspend the Execution of Vernon Madison Scheduled for January 25, 2018 Because He Is Incompetent to Be Executed, at 9. (Mobile Cnty. Cir. Ct., Dec. 18, 2017).

[6] MRI imaging on January 4, 2016, confirmed this thalamic stroke. (Pet. Ex. 10 at 12; Hr'g R. 51-52.)

Madison's competency because it resulted in significant memory loss. (Pet. Ex. 2 at 8; Hr'g R. 46-49.) The thalamus is a "connection organ" that links the limbic system in the lower area of the brain to the frontal lobes, (Hr'g R. 46-47), and when the thalamus is damaged, "the most common thing" that results is memory loss. (Hr'g R. 47; see also Pet. Ex. 2 at 8.)

Consistent with that pattern, Mr. Madison suffers from vascular dementia and resulting retrograde amnesia. (Pet. Ex. 2 at 8; Hr'g R. 47, 52.) Clinical features of vascular dementia, or vascular neurological disorder, include the onset of cognitive deficits, like memory loss, that are temporally related to a cerebrovascular event, such as a stroke. DSM-5 at 621; (Hr'g R. 52-53.) In this case, Mr. Madison's retrograde amnesia has meant that his episodic memory – memory related to events that happened to him in the past – has significantly declined. (Pet. Ex. 2 at 8.)

Consequently, Mr. Madison cannot remember numerous events that have occurred over the past 30 years. (Pet. Ex. 2 at 8.) Critically, he cannot independently recall the facts of the offense for which he was convicted or the previous legal proceedings in his case. (Pet. Ex. 2 at 8; Hr'g R. 55.) Dr. Goff's examination revealed that Mr. Madison was unable to recollect the sequence of events from the offense to his arrest or to his trial, and could not recall the name of the victim. (Pet. Ex. 2 at 7-8.) Ultimately, Dr. Goff concluded that Mr. Madison does not "seem to understand the reasoning behind the current

proceeding as it applies to him" and does not understand why he is scheduled to be executed by the State. (Pet. Ex. 2 at 8-9; Hr'g R. 55, 64-65.)

Dr. Goff's neuropsychological testing revealed that Mr. Madison has an IQ score of 72, which places him in the borderline range of intelligence and is a significant decline from his previous scores, (Pet. Ex. 2 at 6, 9; Hr'g R. 42), and that he has a Working Memory Score of 58, demonstrating severe memory deficits,[7] (Pet. Ex. 2 at 6; Hr'g R. 42-43.) Dr. Goff's testing revealed additional evidence of Mr. Madison's memory impairments: Mr. Madison could not recall any of the 25 elements in a brief story vignette Dr. Goff read him, could not remember the alphabet past the letter G, could not perform serial three additions, could not remember the name of the previous United States President, named Guy Hunt as the governor of Alabama, and could not remember the name of the Warden at Holman Correctional Facility, where he has been incarcerated for over 30 years.[8] (Pet. Ex. 2 at 5.) There is also evidence Mr. Madison has

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[7] The Working Memory Index is scored on a scale that is similar to an IQ test in which 100 is the mean and the standardization is 15. (Hr'g R. 43.) As Dr. Goff explained in his report, Mr. Madison's "memory skills in regard to working memory fall within the severely impaired range with scores comparable to IQ test scores in the 50's" thereby placing him "within the borderline to intellectually disabled range" (Pet. Ex. 2 at 8); akin to the functioning of an individual for whom the death penalty has been held to be categorically unavailable under the Eighth Amendment, see Atkins v. Virginia, 536 U.S. 304 (2002).

[8] Dr. Kirkland testified that Mr. Madison was only *partially* oriented to time and place. (Hr'g R. 19-20; Ct. Ex. at 9.)

difficulty processing information. During the examination, Dr. Goff noted that Mr. Madison was unable to rephrase simple sentences and was unable to perform simple mathematical calculations. (Pet. Ex. 2 at 7.) Dr. Goff concluded that these deficits likely resulted, at least in part, from the January stroke. (Pet. Ex. 2 at 8.)

Prior to this January stroke, Mr. Madison had suffered other strokes that have contributed to his cognitive decline. (Hr'g R. 19-20, 49-52.) These strokes include a basilar artery occlusion, causing bilateral cerebral and occipital infarctions, in May 2015[9] that resulted in increased brain pressure, white matter attenuation, and possible temporal lobe damage, which can cause memory difficulties.[10] (Pet. Ex. 2 at 2; Hr'g R. 49-50.) In the aftermath of the stroke, Mr. Madison was in an "altered mental status," (Pet. Ex. 2 at 2; Pet. Ex. 7, Vol. 4 at 305), and deemed to have a diminished ability to comprehend, (Pet. Ex. 7, Vol. 4 at 406). He was also unaware of where he was or why he was there and appeared confused. (Pet. Ex. 7, Vol. 4 at 424, 428, 449, 453.) His speech was slurred, he exhibited signs of an impaired memory, and he could not remember the officers who were guarding him, whom he had known for years. (Pet. Ex. 7,

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[9] Records indicate that Mr. Madison suffered strokes prior to the May 2015 incident which negatively impacted his cognitive and bodily functioning. (Pet. Ex.2 at 8; Hr'g R. 49.)

[10] As a result, Mr. Madison was taken to the ICU and a neurosurgeon was placed on standby due to a high risk of fatal brain herniation. (Pet. Ex. 7, Vol. 4 at 308.)

Vol. 4 at 428, 431; see also Pet. Ex. 2 at 5, 8.)

As a result of these multiple strokes, Mr. Madison also suffers from encephalomalacia, (Pet. Ex. 10 at 40, 48, 140; Hr'g R. 51), which means that there are areas of his brain where the tissue is dead. (Hr'g R. 51-52.) MRI imaging in January 2016 depicted encephalomalicia in the occipital lobes and cerebellar hemispheres. (Pet. Ex. 10 at 12; Hr'g R. 51-52.)

In addition to the strokes, Mr. Madison suffers from multiple medical conditions that, over the years, have led to worsening cognitive capacity, including Type 2 Diabetes, chronic hypertension, and chronic small vessel ischemia.[11] (Pet. Ex. 2 at 8; Hr'g R. 18-19, 50-51.) Mr. Madison also suffers from occipital angioma – an abnormal collection of blood vessels – which likely contributed to his strokes and debilitating headaches. (Pet. Ex. 7, Vol. 4 at17.) Furthermore, Mr. Madison now speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain. (Pet. Ex. 7, Vol. 5 at 167; Hr'g R. 18-19, 37-38, 49-50.)

At the April 2016 hearing in the state trial court, Mr. Madison appeared in a wheelchair as a "physically ill individual" and it was not clear that he was

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[11] This type of ischemia, also known as "cerebral small vessel disease," is a "leading cause of cognitive decline." John G. Baker et al., Cerebral Small Vessel Disease: Cognition, Mood, Daily Functioning, and Imaging Findings from a Small Pilot Sample, 2.1 Dementia & Geriatric Cognitive Disorders 169 (2012), available at http:// www.ncbi.nlm.nih.gov/pmc/articles/PMC3347879/#.

able to follow anything that occurred at the hearing. Order, at 9, Madison v. State, No. CC-1985-1385.80 (Mobile Cnty. Cir. Ct. April 29, 2016).

On April 29, 2016, this Court denied Mr. Madison's §15-16-23 petition, specifically accepting on Dr. Kirkland's testimony as to "the understanding Madison has concerning the situation," and refusing to credit the opinion of Dr. John Goff. Id. at 10. Pursuant to Section 15-16-23, appellate review of that decision in the Alabama state courts was unavailable. See Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995).

On May 4, 2016, Mr. Madison filed a petition for habeas corpus and a motion for a stay of execution in the United States District Court for the Southern District of Alabama. Petition for Writ of Habeas Corpus, Madison v. Dunn, No. 1:16-cv-00191-KD-M (S.D. Ala. May 4, 2016). On May 10, 2016, the district court denied Mr. Madison's habeas petition and motion for a stay. Order, Madison v. Dunn, No. 16-00191-KD-M, 2016 WL 2732193 (S.D. Ala. May 10, 2016). On May 12, 2016, the Eleventh Circuit Court of Appeals granted Mr. Madison's motion for a certificate of appealability, stayed the execution, and ordered expedited briefing and oral argument in the case. Order, Madison v. Dunn, No. 16-12279 (11th Cir. May 12, 2016).

After full merits briefing and oral argument, the Eleventh Circuit Court granted habeas corpus relief, finding that by virtue of his vascular dementia and related medical impediments, Mr. Madison was not competent to be executed.

Madison v. Comm'r, Ala. Dep't of Corr., 851 F.3d 1173, 1190 (11th Cir. 2017). Notably, based on the evidence presented, all three judges agreed that Mr. Madison did not have a rational understanding of the link between the crime and his scheduled execution, and was therefore incompetent to be executed. Id. at 1189-90; 1190 (Jordan, J., dissenting) ("After reviewing the record, I believe that Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him at this time . . . .").

After this Court issued its per curiam opinion reversing the Eleventh Circuit's grant of habeas corpus relief while expressing "no view on the merits of the underlying question," Dunn v. Madison, 138 S. Ct. 9, 12 (2017), as it was not "appropriately presented," id. (Ginsburg, J., concurring), the State of Alabama immediately sought and obtained an expedited execution date for Mr. Madison of **January 25, 2018**.

True to Dr. Goff's prediction and consistent with medical literature, in the nineteen months since his previous competency determination, Mr. Madison has continued to suffer both physical and cognitive decline. In light of the irreversible and progressive nature of his condition, Mr. Madison once again challenged his competency to be executed by filing a petition pursuant to Alabama Code Section 15-16-23 in the Mobile County Circuit Court. Mr. Madison asserted that the circuit court was required to reassess Mr. Madison's competency to be executed given the degenerative nature of Mr. Madison's

dementia as well as the emergence of new facts that at the time of the evaluation in this case, the court-appointed expert, Dr. Kirkland, on whom the circuit court and this Court relied in finding Mr. Madison competent, was suffering from a substance abuse disorder, using forged prescriptions to obtain controlled substances just four days after the hearing in this case and was ultimately charged with four felonies and suspended from the practice of psychology.

At a scheduled hearing on Mr. Madison's petition, the State did not contradict the allegations regarding Dr. Kirkland or that Mr. Madison's condition was irreversible and progressive, but the circuit court nevertheless denied relief, deeming Mr. Madison competent to be executed. See Appendix A.

REASONS FOR GRANTING THE WRIT

Competency to be executed claims are generally not ripe for review until condemned prisoners have exhausted their appeals and face imminent execution. See Panetti v. Quarterman, 551 U.S. 930, 947 (2007) ("[C]laims of incompetency to be executed remain unripe at early stages of the proceedings."); Burton v. Stewart, 549 U.S. 147, 154-55 (2007) (competency-to-be-executed claim "necessarily unripe until the State issued a warrant for his execution."). As a result, this Court has less frequently had the opportunity to address the Eighth Amendment's requirements for when a prisoner is incompetent to be executed than most substantive and procedural questions that emerge in the death penalty context. This case presents an important opportunity to address an

urgent and compelling question about whether the Eighth Amendment permits the execution of someone with dementia and acute cognitive decline which will not be resolved without this Court's intervention.

This Court's jurisprudence relating to competency-to-be-executed claims is encompassed by two opinions. In Ford v. Wainwright, this Court held that the Eighth Amendment prohibits states from executing those who are mentally incompetent. 477 U.S. 399, 409-10 (1986). Subsequently, in Panetti v. Quarterman, this Court reaffirmed the basic premise of Ford, noting that "today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." 551 U.S. at 957 (quoting Ford, 477 U.S. at 409-410). Recognizing that the retributive purpose of capital punishment is called into question where an individual's mental state is so distorted "that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole," this Court clarified that a "prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." Id. at 959.

Since Ford and Panetti, scientific and medical advancements have led to a greater understanding of how neurocognitive disorders manifest in individuals who suffer from cognitive decline due to formerly undefined reasons. Vernon Madison is one of these individuals.

It is undisputed that as a consequence of a thalamic stroke, along with several other severe strokes, he has been diagnosed with vascular dementia. He has suffered cognitive decline and is unable to recollect the sequence of events from the offense, to his arrest, to his trial and can no longer connect the underlying offense to his punishment. Because his disability renders him unable to remember the underlying offense for which he is to be punished, his execution does not comport with the evolving standards of decency required by this Court's Eighth Amendment jurisprudence.

A. This Court's Jurisprudence Recognizes that Medical and Scientific Advancements Inform an Eighth Amendment Analysis.

Following the "impressive historical credentials" on the bar to executing the incompetent, Ford, 477 U.S. at 406, this Court has never sought to constrain the world of maladies that can give rise to a finding that a prisoner is incompetent to be executed. In Ford, this Court was unconcerned with giving name to the source of a person's (or "mad man's") "mental condition," "sanity," "diagnoses," "nonsane memory," "mental awareness," or "capacity," but sought only to mark the line where a lack of rational understanding would separate those whom society could execute from those for whom death would be cruel and unusual. Id. And in Panetti, this Court reflected that Ford's "four-Justice plurality discussed the substantive standard at a high level of generality." 551 U.S. at 957. As such, the Panetti opinion likewise speaks variously of "mental

state," "mental illness," "mental disorder," and "psychological dysfunction," fully rejecting any call to "to amplify [the Court's] conclusions or to make them **more precise**."[12] Id. at 961. Panetti presents the only occasion on which this Court has ever commented on what affliction might meet the standard for incompetence, but it only did so to prevent narrowing of the inquiry.

In part, this Court's reluctance to precisely demarcate the world of afflictions that could give rise to incompetence is emblematic of it's recognition that medical, technological, and social science advancements inform Eighth Amendment categorical protections. See, e.g., Moore v. Texas, 137 S. Ct. 1039, 1052-53 (2017) ("The medical community's current standards supply one constraint on States' leeway [to determine intellectual disability]. Reflecting improved understanding over time, [the DSM-V and American Association on Intellectual and Developmental Disabilities Manual] offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" (citations omitted)); Miller v. Alabama, 567 U.S. 460, 471 (2012) ("Our decisions rested not only on common sense . . . but on science and social science as well."); id. at 472 n.5 ("[T]he science and social science

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[12] All relevant opinions decided prior to Ford concerned only procedural questions presented under the Fourteenth Amendment. 477 U.S. at 405 (distinguishing prior cases on "adequacy of procedures" from the "substantive restriction" held to apply). Ford itself, in erecting the Eighth Amendment bar, offered no guidance on what evidence, i.e., what diagnoses, test results, brain scans, or behavior, is required to meet the standard for incompetence.

supporting Roper[v. Simmons, 543 U.S. 551 (2005)]'s and Graham [v. Florida, 560 U.S. 48 (2010)]'s conclusions have become even stronger.").

This recognition is apparent in Panetti, where this Court eschewed a "strict test" for competency and admonished the Fifth Circuit for restricting and disregarding "evidence of psychological dysfunction," emphasizing the need for the "conclusions of physicians, psychiatrists, and other experts in the field" to inform analysis under the rational understanding standard. 551 U.S. at 960, 962.

Over the past several decades, scientific and medical advances have allowed for a deeper understanding of the manifestations and effects of dementia. Technological advances in brain imaging such as magnetic resonance imaging (MRI), the supplementation of brain volumetrics with new technology, and resulting improvements in brain mapping have revolutionized the medical community's ability to diagnose neurocognitive disorders in general. John Morihisa, Advances in Brain Imaging, 25-27 (2008); Mark S. Forman, et. al., Neurodegenerative Diseases: A Decade of Discoveries Paves The Way For Therapeutic Breakthroughs, 10 Nature Medicine 1055 (2004), see also Major Milestones in Alzheimer's and Brain Research, Alzheimer's Association, https://www.alz.org/research/science/major_milestones_in_alzheimers.asp (last visited Jan. 18, 2018).

For physicians dealing with memory-disordered patients, these advances

mean that lesions on the brain can now be more readily detected, "allowing for links to be drawn between the presence of lesions and the pattern and severity of memory disorder." Narinder Kapur and Michael Kopelman, Advanced Brain Imaging Procedures and Humam Memory Disorder, 65(1) British Medical Bulletin 61 (2003) ("The ability to form three-dimensional images of lesions . . . and to visualize their location in relation to key anatomical structures and in relation to critical white matter tracts, may provide the physician and the neurosurgeon with a clearer idea of the size of a lesion and of its location vis-à-vis critical anatomical regions that have a role in memory functioning.") Indeed, these technological advancements have been so significant as to necessitate the emergence of cognitive neuroscience as an entirely new field of research. See Morihisa, Advances in Brain Imaging, at 25.

The Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders reflects these advances in neuroscience by including expanded criteria for the diagnosis of dementia, now referred to as "major neurocognitive disorder." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 621 (5th ed. 2014) (hereinafter "DSM-5"). In addition to the core diagnostic criteria, which requires significant cognitive decline that interferes with independence in at least one cognitive domain, the DSM-5 now provides for ten different etiological subtypes of major neurocognitive disorder, with separate criteria for each. Darrel Regier, et. al., The DSM-5: Classification and Criteria

Changes, 12(2) World Psychiatry 92 (2013). This expansion encapsulates the medical community's wider understanding of the manifestation of neurocognitive disorders in patients who suffer from cognitive decline due to formerly undefined reasons.

B. The Penological Objectives of the Eighth Amendment Cannot be Squared with the Execution of a Prisoner Whose Vascular Dementia and Associated Cognitive Decline Renders Him Unable to Remember the Commission of the Crime for Which He is to be Executed.

This Court held in Ford, and reiterated in Panetti, that the execution of those who are incompetent does not serve the penological justifications for imposing the death penalty. Likewise, imposing death on a prisoner, who, like Mr. Madison, suffers from substantial memory deficits by virtue of multiple strokes and resulting vascular dementia serves no retributive or deterrent purpose, but exhibits an abhorrent infliction of the ultimate punishment on someone without "capacity to come to grips with his own conscience or deity." Ford, 477 U.S. at 409.

First, executing an individual with no memory of the underlying offense serves no retributive purpose. Retribution is served where an offense is offset by a punishment expressing society's "moral outrage," see Gregg v. Georgia, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), but where the person being punished has no memory of the commission of the offense for which he is to be executed, the "moral quality" of that punishment is

lessened and unable to match outrage over the offense, Ford, 477 U.S. at 407-08. As this Court explained in Panetti, retribution is not achieved where "a prisoner's recognition of the severity of the offense" does not match "the objective of community vindication." 551 U.S. at 958. For purposes of retribution, there is no moral difference where as a result of delusion a person cannot "recognize . . . the severity of the offense" and where a person as a result of dementia, cognitive decline, and memory deficits is likewise unable to do so.[13]

Nor can executing Mr. Madison cannot be justified on grounds of deterrence. Ford made plain: the execution of an incompetent person "presents no example to others and thus has no deterrence value." 477 U.S. at 399; Panetti, 551 U.S. at 958 (same). Whether it is by delusion or memory deficits, a lack of rational understanding undermines the deterrence objective of capital punishment. Most obvious, with incapacity by virtue of dementia, specific

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[13]This lack of moral difference is all the more clear considering the positions expressed by the American Bar Association, American Psychiatric Association, American Psychological Association, and the National Alliance of the Mentally Ill support a bar on imposing the death penalty on those with dementia. See Am. Bar Ass'n, Recommendation and Report on the Death Penalty and Persons with Mental Disabilities (2006), reprinted in 30 Mental & Physical Disability L. Rep. 668, 668 (2006). These groups have recognized that age of onset is the only difference between an individual who is intellectually disabled, and therefore ineligible for the death penalty, Atkins v. Virginia, 536 U.S. 304 (2002), and an individual who suffers from dementia. Am. Bar Ass'n, Severe Mental Illness and the Death Penalty 7 (2016) https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf. This is consistent with evidence that Mr. Madison has an unrebutted IQ of 72 as a result of his stroke and cognitive decline. (Pet. Ex. 2 at 6.)

deterrence is already achieved. Panetti, 477 U.S. at 958.

Finally, executing Mr. Madison would implicate society's, and by extension the Eighth Amendment's, aversion to grotesque and obscene punishments. In failing to find retributive and deterrent justifications for executing an incompetent person, this Court recognized the "natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity." Ford, 477 U.S. at 409-10. The ban on cruel and unusual punishment, in curbing punishments lacking in penological justification, serves to uphold the "standards of decency" that define "progress of [our] maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). "Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance," Justice Marshall wrote for a majority of this Court, the Eighth Amendment bars executing someone lacking "capacity" and "understanding," regardless of whether the deficiency is due to delusion or dementia, like Mr. Madison. Ford, 477 U.S. at 410.

Punishment without penological justification, as here, "risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

C. Mr. Madison's Severe Memory Impairments as a Result of Vascular Dementia Render him Incompetent to be Executed Under the Eighth Amendment.

In Panetti, this Court reviewed the lower court's test for evaluating a prisoner's competency to be executed – first, that the prisoner is aware that he committed the murders; second, that the prisoner is aware that he will be executed; and third, that the prisoner is aware that the reason that the State seeks to execute him is his commission of the murders – and determined that it was too restrictive under the Eighth Amendment. 551 U.S. at 956. This Court found that a prisoner may be incompetent even though he "can identify the stated reason for his execution," and explained that for purposes of determining competency to be executed, a prisoner's "awareness of the crime and punishment" is not merely a "prisoner's awareness of the State's rationale for an execution," but rather encompasses, at a minimum, "a rational understanding of it." Id. at 959.

Consistent with Panetti's holding, courts have recognized dementia and attendant cognitive decline and memory impairment as a basis for a finding of incompetency to be executed. See, e.g., Stanley v. Chappell, No. 3:07-CV-04727-EMC, 2013 WL 3811205, at *1 (N.D. Cal. July 16, 2013) (finding death-row prisoner incompetent to be executed due to dementia caused, at least in part, by encephalomalacia); Mays v. State, 476 S.W. 3d 454, 462 (Tex. Ct. App. 2015) (holding that death row prisoner made substantial showing of

incompetence to be executed in part because of dementia and impaired memory).[14]

The evidence and testimony in this case clearly establish that Mr. Madison is not competent to be executed because his memory deficits prevent him from having a rational understanding of the reason for his execution. Dr. Goff determined that as a result of a thalamic stroke, Mr. Madison suffers from vascular dementia, which has resulted in a decline in cognitive functioning and significant memory impairment. Consequently, Mr. Madison cannot remember numerous events that have occurred over the past thirty years or more. (Pet. Ex. 2 at 8.) Dr. Goff's examination revealed that Mr. Madison cannot independently recall the facts of the offense, the sequence of events from the offense, to his arrest, to his trial or previous legal proceedings in his case and he could not

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[14] Courts have also recognized that memory impairments may render a defendant incompetent to stand trial. See United States v. Andrews, 469 F. 3d 1113, 1119 (7th Cir. 2006) ("a defendant's lack of memory could lead a district court to find a defendant incompetent to stand trial"); United States v. Rinchack, 820 F.2d 1557, 1569 (11th Cir. 1987) (affirming case-by-case examination of whether memory deficits render defendant incompetent to stand trial); Wilson v. United States, 391 F.2d 460, 463 (D.C. Cir. 1968) (rejecting contention that memory deficits can never provide grounds for incompetence to stand trial, favoring case-by-case approach); People v. Palmer, 31 P.3d 863, 870 (Colo. 2001) (en banc) ("[I]f a defendant's amnesia renders him unable to understand the proceedings against him or to assist in his own defense then he must be found incompetent."); State v. Garcia, 998 P.2d 186, 189-191 (N.M. Ct. App. 2000) (affirming finding of incompetence to stand trial of defendant with "dementia, secondary to diabetes" and "mild to moderate mental retardation, which was likely connected to his dementia").

recall the name of the victim. (Pet. Ex. 2 at 8; Hr'g R. 46, 52, 55, 64-65.)[15] Ultimately, Dr. Goff concluded that Mr. Madison does not "seem to understand the reasoning behind the current proceeding as it applies to him" and does not understand why he is scheduled to be executed by the State. (Pet. Ex. 2 at 8-0; Hr'g R. 55, 64-65.) In response to direct questioning by the state trial judge at the hearing, Dr. Goff testified that while Mr. Madison may understand that the State is seeking retribution, he does not "understand[] the act that he's being – that he's being punished for." (Hr'g R. 65.) See Panetti, 551 U.S. at 957 (determination of competency requires inquiry into "prisoner's ability to 'comprehen[d] the reasons' for his punishment" or "a determination into whether he is 'unaware of . . . why [he is] to suffer it'") (quoting Ford, 477 U.S. at 417 and id. at 422 (Powell, J., concurring)).

CONCLUSION

Vernon Madison suffers from vascular dementia and as a result of bodily and cognitive decline, has no memory of the commission of the offense for which the State seeks to execute him on January 25, 2018. This Court should grant

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[15] Dr. Goff's neuropsychological testing established that Mr. Madison has significant memory deficits. (Pet. Ex. 2 at 5-6; Hr'g R. 41-45.) Specifically, Dr. Goff's testing established that Mr. Madison has a Working Memory Score of 58. (Pet. Ex. 2 at 6; Hr'g R. 43.) The Working Memory Index is scored on a scale that is similar to an IQ test in which 100 is the mean and the standardization is 15. (Hr'g R. 43.) As Dr. Goff explained in his report, Mr. Madison's "memory skills in regard to working memory fall within the severely impaired range with scores comparable to IQ test scores in the 50's. (Pet. Ex. 2 at 8.)

certiorari to resolve the critically important question of whether the Eighth Amendment prohibits the execution of a prisoner who has suffered severe cognitive decline as a result of dementia and acute medical conditions that prevent him from remembering the offense or understanding the circumstances of a scheduled execution.

Respectfully Submitted,

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APPENDIX A

ELECTRONICALLY FILED
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02-CC-1985-001385.80
CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
JOJO SCHWARZAUER, CLERK

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-1985-001385.80
	)	
MADISON VERNON	)	
Defendant.	)	

ORDER

This Court held a hearing on January 16, 2018 on Defendant's petition to suspend his execution because he claims he is incompetent to be executed pursuant to Alabama Code §15-16-23. The Defendant was present and represented by counsel. Counsel from the Office of the Attorney General were also present for the State of Alabama. This Court received argument on the issue.

The Defendant did not provide a substantial threshold showing of insanity, a requirement set out by the United States Supreme Court, sufficient to convince this Court to stay the execution. As a result, this Court hereby DENIES Defendant's petition to stay the execution. And the State's motion to dismiss the petition to suspend the execution is hereby GRANTED.

DONE this 16th day of January, 2018.

ROBERT H. SMITH
CIRCUIT JUDGE

No. 17-7505
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

VERNON MADISON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the
Circuit Court of Mobile County, Alabama (02-CC-85-1385.80)

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January 19, 2018

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STATEMENT OF THE CASE

In April 1985, Vernon Madison killed Officer Julius Schulte during a domestic dispute. At the request of Madison's neighbors, Officer Schulte was protecting Madison's ex-girlfriend and her eleven-year-old daughter while Madison moved out of their house. After pretending to leave, Madison retrieved a pistol, crept behind the police car where Schulte was sitting, and fired two shots into the back of Schulte's head. *Madison v. State*, 620 So. 2d 62, 64 (Ala. Crim. App. 1992). After shooting Officer Schulte, Madison shot his ex-girlfriend in the back as she tried to run away. *Id.* Three eye witnesses watched Madison murder Officer Schulte and attempt to murder his girlfriend. *Id.*

Procedural History

Madison's petition for writ of certiorari seeks review of the order of the Circuit Court of Mobile County, Alabama, denying his petition for a stay of execution, which sought a stay on competency grounds. This was Madison's second unsuccessful attempt to obtain a stay on this ground, and he relied on the same facts established at the hearing on his previous petition. The only additional evidentiary basis he alleged in the petition was the existence of drug-related charges against the court-appointed psychiatrist who conducted his competency examination in 2016.

1. Trial, Direct Appeal, and Collateral Attacks.

Madison was charged with capital murder because he murdered an on-duty police officer. *See* ALA. CODE § 13A–5–40(a)(5) (1975). He was tried and convicted three times because of errors in his first and second trials. *See Madison v. State*, 545 So. 2d 94, 99 (Ala. Crim. App. 1987); *Madison v. State*, 620 So. 2d 62, 63 (Ala. Crim. App. 1992); *Madison v. State*, 718 So. 2d 90 (Ala. Crim. App. 1997). Madison denied committing the murder before his first two trials and claimed self-defense at his third. After each trial, Madison was sentenced to death in the light of his history of violent crime. His third conviction and sentence were affirmed by the Alabama Court of Criminal Appeals, *Madison*, 718 So. 2d at 104, and the Alabama Supreme Court, *Ex parte Madison*, 718 So. 2d 104, 108 (Ala. 1998).

Thereafter, Madison filed a state post-conviction petition in the Mobile County Circuit Court. The circuit court determined that his claims were procedurally barred, precluded from review, or meritless, and it summarily dismissed Madison's petition pursuant to Rule 32.7(d) of the Alabama Rules of Criminal Procedure. The Alabama Court of Criminal Appeals affirmed in a published opinion. *Madison v. State*, 999 So. 2d 561 (Ala. Crim. App. 2006). The Alabama Supreme Court denied certiorari.

Following the state court proceedings, Madison filed a habeas petition in the United States District Court for the Southern District of Alabama. The district court denied the petition, but on appeal the Eleventh Circuit reversed

the denial of relief as to a *Batson* claim, and remanded the case for an evidentiary hearing in the district court. *Madison v. Comm'r, Ala. Dep't of Corrs.*, 677 F.3d 1377 (11th Cir. 2012). After an evidentiary hearing, the district court denied Madison's *Batson* claim, and the denial of habeas relief was affirmed by the Eleventh Circuit. *Madison v. Comm'r, Ala. Dep't of Corrs.*, 761 F.3d 1240 (11th Cir. 2014). This Court declined certiorari review. *Madison v. Thomas*, 135 S. Ct. 1562 (2015) (mem.).

2. Madison's Previous Challenge as to His Competency to be Executed.

After the Alabama Supreme Court ordered the execution of Madison's sentence in 2016, Madison filed a state-court petition claiming he was incompetent to be executed because he could not remember murdering Officer Schulte. The Mobile County Circuit Court conducted a hearing to evaluate Madison's claim of incompetence and gave him the opportunity to submit evidence, including evidence from his own psychological expert. Before the hearing, Madison was evaluated by Dr. John Goff (a neuropsychologist retained by Madison) and Dr. Karl Kirkland (a court-appointed psychologist). At the hearing, the court admitted Dr. Goff's report, Dr. Kirkland's report, and Madison's medical records. The court also heard testimony from Dr. Goff, Dr. Kirkland, and the warden of the prison where Madison was housed. After considering this evidence and testimony, the circuit court denied Madison's petition for a stay of execution.

Because Alabama law does not provide a right to appeal a circuit court's sanity determination, in the competency-to-be-executed context, by way of the state's appellate system, *see* Code of Alabama, section 15-16-23 (1975), Madison elected to file a habeas petition in federal court challenging the state court's judgment. The district court denied Madison's petition, finding that the state court's decision did not involve an unreasonable application of the law or facts.

On the morning of his scheduled execution, however, the Eleventh Circuit granted Madison a stay and a certificate of appealability. The State petitioned this Court to vacate the stay. Four Justices—the Chief Justice, Justice Kennedy, Justice Thomas, and Justice Alito—voted to vacate the stay. There were only eight Justices serving on the Court at that time, and the Eleventh Circuit's stay of execution was undisturbed.

A divided panel of the Eleventh Circuit reversed the district court and granted Madison's petition for writ of habeas corpus. This Court granted the State's petition for writ of certiorari and reversed the Eleventh Circuit's grant of habeas relief. *Dunn v. Madison*, 138 S. Ct. 9 (2017).

3. Madison's Most Recent Competency Proceedings.

After this Court reversed the Eleventh Circuit's grant of habeas relief, the Alabama Supreme Court set a new date for the execution of Madison's sentence. On December 18, 2017, Madison filed a second petition in the circuit court seeking a stay of execution on insanity grounds. He included no new

documents, affidavits, or other evidence pertaining to his medical or mental health, relying instead on the testimony and evidence presented during his previous competency hearing. The sole additional fact he asserted was that felony drug charges had been brought against the court-appointed expert from the previous proceeding.

The State moved to dismiss the petition on multiple grounds. The circuit court held a hearing on the State's motion and, after argument, it dismissed Madison's petition for a stay. Because no state appeal is permitted from petitions alleging insanity as a ground of incompetency to be executed, Madison has elected to petition this Court for certiorari review.

REASONS FOR DENYING THE PETITION

The questions Madison presents for review are not squarely presented on the procedural posture of this case. For example, the "law of the case" doctrine and considerations related to issue preclusion should remove the underlying proceedings from the new legal theory Madison advances. Of equal concern, the doctrine of "invited error" weighs heavily against granting the petition. Also, the applicable abuse-of-discretion standard of review governing the circuit court's finding that Madison failed to meet a threshold showing of incompetency makes it nearly impossible to squarely address the questions presented. Finally, Madison's proposed expansion of the Court's Eighth Amendment jurisprudence, if adopted, would wreak havoc on other aspects of criminal procedure.

Madison's attack on the court-appointed expert adds nothing to his petition, serving only as a red herring. Madison retained his own expert to assist with the presentation of evidence at the 2016 competency hearing. As this Court noted when it reversed the Eleventh Circuit's grant of habeas relief on this evidence, "[t]estimony from each of the psychologists who examined Madison supported the court's finding that Madison understands both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime." *Madison*, 138 S. Ct. at 12. Not only did Madison's expert's testimony support the trial court's decision, but his expert also did not find any fault or errors with the court-appointed expert's

methodology or employment of generally accepted psychiatric practices and principles.

I. Review of the questions presented by Madison should be foreclosed under the "law of the case" doctrine and considerations related to issue preclusion.

Madison's latest petition for a stay was based on the evidence presented to the circuit court during the 2016 competency hearing. At a hearing on January 16, 2018, counsel for Madison explicitly conceded to the circuit court that no additional affidavits, medical records, or other evidence – aside from the alleged extrinsic evidence of pending criminal charges against the court-appointed expert – supported his request for stay based on insanity. Thus, when the circuit court was presented with what was essentially a successive petition for a stay, there was no reason for that court to depart from its earlier ruling.

As most commonly defined, the "law of the case" doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. *Id.* at 619 (quoting *Montana v. United States*, 440

U.S. 147, 153 (1979)). Application of this doctrine, and the attendant advancement of its stated aims, is warranted in this case.

Following his unsuccessful bid to obtain a stay of execution on competency grounds in 2016, Madison elected to seek habeas relief rather than pursue certiorari review in this Court. Madison's claim received a full round of federal review, including the issuance of a stay of execution by the Eleventh Circuit, oral argument in that court, and a grant of relief. It is undisputed that Madison received a full and fair opportunity to litigate his competency claim in 2016, including full federal review of the state court's decision.

Additional expenditure of judicial resources is not warranted to review a legal decision based on facts that have not changed, especially in the light of the expense and vexation that would be imposed on the State of Alabama, not the least of which would be a further delay in having Madison's sentence carried out. And while the doctrine does not present an absolute bar to review in this Court, the critical issue here is whether it applied in the circuit court. After all, once the state court's prior ruling was left intact after a full round of federal review, why would the trial court believe a different legal standard should be applied to a successive competency petition? This is especially true in the light of the fact that the state statue under which Madison sought relief is limited to allegations of insanity. ALA. CODE § 15-16-23 (1975).

Similar to the "law of the case" doctrine, the claim-preclusion doctrine "instructs that a final judgment on the merits 'foreclose[es] successive

litigation of the very same claim.'" *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 357 (2016) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)). "The allied doctrine of issue preclusion ordinarily bars relitigation of an issue of fact or law raised and necessarily resolved by a prior judgment." *Id.* at 538 (citing Restatement (Second) of Judgments §§ 17, 27, pp. 148, 250 (1980); 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4416, p. 386 (2d ed. 2002)). Both doctrines weight against granting the petition in this case.

It is undisputed that the parties to the proceedings below are identical to the parties in the 2016 proceeding to determine Madison's competency. And while a person's competency is subject to change – a factor that could negate these preclusion considerations in appropriate cases – Madison explicitly informed the state court that he was relying on the evidence presented during the 2016 competency hearing. Under such circumstances, nothing can be said to have occurred that would diminish the "underlying confidence that the result achieved in the initial litigation was substantially correct." *Bravo-Fernandez*, 137 S. Ct. at 538 (quoting *Standefer v. United States*, 447 U.S. 10, 23 n.18 (1980). For this reason, the state court's determination that Madison did not make the substantial threshold showing necessary to warrant further inquiry into his competency weighs heavily in favor of denying the writ.

As discussed in ground two, below, Madison did aver in his latest petition that since the 2016 competency hearing he "has continued to suffer

from vascular dementia, a degenerative disease which is both irreversible and progressive, as well as physical and cognitive decline" and "[t]rue to Dr. Goff's predication and consistent with medical literature, in the nineteen months since his previous competency determination, Mr. Madison has continued to suffer both physical and cognitive decline." (Pet. 1, 15.) Yet Madison offered no evidence in support of this allegation in the state court, conceding to the circuit court that Dr. Goff had made no additional evaluations or findings as to his physical or cognitive condition. Had Madison made a substantial threshold showing of changed circumstances, application of any grounds of preclusion might be unwarranted or inequitable. Because he did not, this Court should deny the petition.

Finally, the same considerations of comity and federalism that supported this Court's reversal of the Eleventh Circuit last year apply with equal force to this petition. Madison had the opportunity to seek certiorari review outside the context of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) following the denial of his 2016 petition, when the state trial court applied the facts upon which Madison relies in this petition to the requirements of *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). Madison chose, instead, to pursue relief by way of a petition for writ of habeas corpus. Having failed to obtain relief through that avenue, Madison now attempts his second bite at the apple. To permit such an end-run of AEDPA's constraints on review of a state court

decision, when no factual circumstances have changed, would make a mockery of its aims of promoting comity and federalism. *Cf. Panetti*, 551 U.S. at 947 ("The [AEDPA] statutory ban on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed *when the claim is first ripe.*") (emphasis added).

II. The invited-error doctrine should prevent review of the questions presented for review.

Madison petitioned the circuit court for relief pursuant to section 15-16-23 of the Code of Alabama, which is entitled, in relevant part, "suspending execution of death sentence of insane convict." That statute provides, "If after conviction and sentence to death, but at any time before the execution of the sentence, it is made to appear to the satisfaction of the trial court *that the convict is then insane,* such trial court shall forthwith enter an order" suspending the execution of the sentence. *Id.* (emphasis added). The statute is clearly worded in terms of an inmate's sanity, thus the applicability of *Ford* and *Panetti* to petitions brought pursuant to this statute.

Madison does not argue that he is insane. Instead, he argues that he suffers from dementia, that he does not remember committing the murder for which he was convicted and sentenced to death, and that his execution should be barred on Eighth Amendment grounds by way of an expansion of the holdings in *Ford* and *Panetti*. In other words, Madison alleges that "[t]he constitution of the United States" requires "other relief," or that "[t]he sentence imposed. . . is otherwise not authorized by law." Ala. R. Crim. P. 32.1(a), (c).

Even though Madison's claim is not predicated upon his insanity, he proceeded in the state trial court under a statute that applies only to cases of insanity, foregoing Alabama's mandatory post-conviction remedy for all other non-insanity forms of relief. *See* Ala. R. Crim. P. 32.4.

Madison is not insane. Even if this Court were to expand its holdings in *Panetti* and *Ford* in the manner he advocates, this would not require a state court to consider such a claim under a statutory procedure that is specifically designed to address questions of sanity. Accordingly, the trial court properly denied Madison's petition as brought under section 15-16-23, as the statute is limited to the suspension of death sentences for insane prisoners.

Had Madison wished to have his non-insanity Eighth Amendment claim considered outside of the sanity-insanity context, he should have filed a petition for post-conviction relief in the trial court. He did not. By choosing to proceed under a statute that applies exclusively to capital inmates alleging insanity, Madison invited any "error" in the trial court's ruling. That is, the sole question to be answered under the state statute was whether Madison was insane, not whether he suffered from dementia such that his execution would be cruel and unusual under a yet-unannounced expansion of *Ford* and *Panetti* having little support in existing precedent.[1]

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[1] As noted in the State's petition for certiorari in Dunn v. Madison, the Eleventh Circuit's grant of habeas relief was the sole instance of a court accepting the rule Madison proposes. After this Court reversed that decision, there is no split in authority, and the weight of existing precedent is squarely against Madison's petition. Pet. for Cert. at 12-18, Dunn v. Madison, No. 17-193 (Aug. 2, 2017).

To address the issue of whether the trial court erred by not adopting Madison's argument – that his alleged inability to recall a crime is a sufficient basis to forbid an execution on Eighth Amendment grounds – would be patently unfair when the statute under which Madison sought relief was limited by its plain language to the question of his sanity. As with his prior decision to pursue federal relief, Madison was the architect of his latest effort to escape execution of his sentence. He elected to proceed under a state statute requiring the presence of insanity in order to obtain relief. To the extent that Madison suggests that the trial court erred by not expanding *Ford* and *Panetti* to situations beyond the issue of sanity, he invited that error by placing the trial court in a position where his sanity was the only question of consequence. For this reason, his petition should be denied.

III. The abuse-of-discretion standard of review, and the circuit court's finding that Madison failed to make a threshold showing sufficient to warrant further proceedings bar consideration of the questions Madison presents for review.

Alabama's statutory provision pertaining to stays of execution based on allegations of an inmate's lack of sanity was designed to avoid allowing a person awaiting execution to "file an application every time the last one was denied, *ad infinitum*, thereby defeating the intent of the law and the will of the legislature." *Magwood v. State*, 449 So. 2d 1267, 1268 (Ala. Crim. App. 1984). Movants seeking such a stay are required to establish to the satisfaction of the trial court that the inmate is insane. This is consistent with *Panetti*'s recognition that a prisoner must make "the requisite preliminary showing"

prior to being entitled to an adjudication. 551 U.S. at 934-35; *see also id.* at 949 (recognizing the controlling holding in *Ford* is that a prisoner must make "a substantial threshold showing of insanity"). As noted above, Madison does not allege that he is insane and he did not offer any new evidence in support of his latest petition for a stay.

Thus, even if the Court were to ignore the statute's limited application to cases of insanity, a hearing is not required absent some evidence that the inmate may be incompetent to be executed. At the hearing on January 16, 2018, Madison informed the trial court that he was relying solely on the evidence presented during the 2016 competency hearing. Absent additional evidence sufficient to establish changed circumstances, the circuit court did not abuse its discretion by refusing further proceedings. Madison's petition does not provide any basis for a finding that the trial court abused its discretion by failing to conduct any further proceeding, once it was determined that no new facts supported a preliminary showing of incompetency.

IV. The questions presented for review are not worthy of certiorari, especially on the facts as already stated by this Court.

As noted in the State's petition for writ of certiorari last year, the courts of appeals and state high courts to have consider this issue have resolved it in a manner contrary to the position advanced by Madison. Pet. for Cert. at 12-18, Dunn v. Madison, No. 17-193 (Aug. 2, 2017). This Court's reversal of the Eleventh Circuit's grant of relief removed the sole split of authority. This fact should be of great significance because Madison invokes the "evolving

standards of decency" in his petition. Unlike *Ford*, where "no State in the Union permit[ted] the execution of the insane," 477 U.S. at 408, no such clarity exists as to the rule Madison proposes.

But even if this were not the case, the questions he presents are not worthy of certiorari review, considering the facts as previously stated by this Court. Dr. Goff, Madison's own expert, "found that Madison is 'able to understand the nature of the pending proceeding and he has an understanding of what he was tried for'; that he knows he is 'in prison . . . because of 'murder"; that he 'understands that . . . [Alabama is] seeking retribution' for that crime; and that he 'understands the sentence, specifically the meaning of a death sentence.'" *Madison*, 138 S. Ct. at 10. This is the essence of a "rational understanding."

The idea that the inability to recall an event precludes a rational understanding of that event, or its consequences, is absurd. Madison's argument that a person who does not remember an event *a fortiori* cannot have a rational understanding of its consequences is a logical fallacy of the highest order. The ability to form a rational understanding of an event has very limited relation to whether a person remembers that event.

For example, consider an individual who is sexually assaulted or abused after being surreptitiously administered a date-rape drug. The person regains consciousness and is informed that they were subjected to rape, non-consensual sodomy, or other sexual abuse. It would defy all existing legal and

moral understanding to argue that such an individual would be unable to rationally understand the despicable crime committed against their person. Additionally, it would be cruel to suggest that such a person would be unable to appreciate the consequences (or potential consequences) that such non-consensual sexual contact could mean for their health and well-being, or that they would not be subject to many of the same post-traumatic stresses suffered by those who are sexually assaulted while conscious.

Here, while Madison claims to have no memory of Officer Schulte's murder,[2] his own expert agreed that he understands he was tried for that offense, that he is in prison and will be executed because of that offense, and the finality of death if his sentence is carried out. Madison's claimed inability to remember his offense has no bearing on his rational understanding of his present circumstances. Under these facts, nothing in *Ford* or *Panetti* would support the expansion of this Court's Eighth Amendment jurisprudence in the manner Madison requests.

V. Madison's attack on the court-appointed expert's credibility is a red-herring, bearing no materiality or relevance to the questions presented.

The only new factual averments contained in Madison's most recent petition for a stay of execution involved the arrest of the court-appointed

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[2] The fact that the expansion of the holdings in *Ford* and *Panetti* that Madison advocates would be highly susceptible to malingering – something the medical and mental health profession is no better suited to address than a judge or jury – is another reason that the questions presented are not worthy of certiorari review.

psychiatric expert on drug-related charges.[3] These factual averments have no bearing on the question of whether the holdings in *Panetti* and *Ford* should be expanded to those who claim to have no memory of their crimes. Additionally, these allegations were irrelevant to the extent that "[t]estimony from each of the psychologists who examined Madison supported the court's finding that Madison understands both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime." *Madison*, 138 S. Ct. at 12.

Additionally, the fact that Madison had the services of Dr. Goff, a retained expert, mitigated the concerns that might have otherwise attended the allegations against the court-appointed expert. Rather than disagree with Dr. Kirkland, Dr. Goff *agreed* with the court-appointed expert on matters large and small. Additionally, Dr. Goff did not identify any errors or deficiencies in Dr. Kirkland's methodology, report, or testimony. Madison cannot point to any error or deficiency in the court-appointed expert's professional services in this case.

Had any professional or scientific errors been committed by the court-appointed expert, it should be assumed that Madison's own expert would have identified and exploited them. After all, *Panetti* and *Ford* specifically identified the availability of a defense expert as a critical part of ensuring a fair hearing.

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[3] Madison's brief in opposition to this Court referred to Dr. Kirkland as "a since-discredited state court-appointed psychologist" and referenced his arrest on drug-possession charges. Br. in Opp. at 1, 9 n.3, Dunn v. Madison, No. 17-193 (Sept. 5, 2017).

Panetti, 551 U.S. at 949 (recognizing the protection against arbitrariness and error provided by a prisoner's independent expert); *cf. Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (noting the threat to fair criminal trials posed by prosecution experts is minimized when the defense retains a competent expert).

Further, because Dr. Kirkland has not been found guilty of any charged offenses, Rule 609 of the Alabama Rules of Evidence permitted no negative inference as to his trustworthiness. That rule certainly did not provide such grounds at the time of the 2016 competency hearing. Because Madison's own expert found no professional errors in the court-appointed expert's report and testimony, and because his expert agreed with the court-appointed expert's findings on controlling issues, the trial court did not abuse its discretion in finding the criminal charges brought against Dr. Kirkland after the 2016 competency hearing did not warrant a different outcome.

CONCLUSION

For the above-mentioned reasons, this Court should deny Madison's petition for writ of certiorari.

Respectfully submitted,

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No. 17-7505

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

VERNON MADISON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MOBILE COUNTY CIRCUIT COURT

REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January 22, 2018

REASONS FOR GRANTING THE WRIT

It is undisputed that as a result of multiple, severe strokes over the last several years, Vernon Madison suffers from vascular dementia and has no memory of the commission of the offense for which the State is scheduled to execute him on January 25, 2018. See Madison v. Comm'r., Ala. Dep't. of Corr., 851 F.3d 1173, 1185 (11th Cir. 2017) ("[I]t is uncontroverted that, due to his mental condition, Mr. Madison has no memory of his capital offense."). The condition from which Mr. Madison suffers is irreversible and degenerative: his physical and mental condition has already and will continue to progressively decline.[1] More importantly, the expert upon whom this Court and the circuit court previously relied in this case has been suspended from the practice of psychology after his narcotics addiction led him to forge prescriptions for illegal pills (including one incident occurring just four days after Mr. Madison's 2016 competency hearing) and eventually into drug rehab.

It is also undisputed that a unique provision in Alabama law precludes any state appellate review of the issue of whether a death row prisoner is competent to be executed under the Eighth Amendment. This Court has

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[1] See Constantino Iadecola, The Pathobiology of Vascular Dementia, Neuron 1 (Nov. 20, 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3842016/pdf/nihms531326.pdf (dementia is "an irreversible condition resulting in progressive cognitive decline").

recognized that the reliability, fairness and constitutionality of the death penalty turns on reviewability. Certainly the question of whether the mental state of a prisoner renders him incompetent to be executed raises a critical issue meriting this Court's review.

In its brief in opposition, the State of Alabama does not dispute these facts and its arguments should be rejected and certiorari granted to consider the important question presented in this case: Does the Eight Amendment permit the State to execute a prisoner whose disability leaves him without memory of the commission of a capital offense?

First, the State's contention that the issue presented by Mr. Madison is foreclosed under "law of the case" doctrine because Mr. Madison previously challenged his competency to be executed in May, 2016, is unavailing. State's Resp't's Br. Opp'n. 7. The last court to address the *merits* of Mr. Madison's competency claim in the previous competency litigation found that as a matter of fact and law, Vernon Madison *is* incompetent and that his execution is therefore prohibited by the Eighth Amendment. See Madison, 851 F.3d at 1190 ("We therefore conclude that Mr. Madison is incompetent to be executed."); id. (Jordan, J., dissenting) ("I believe that Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him . . . .").

Moreover, the challenge in this case is to Mr. Madison's current competency to be executed, which arose when the State scheduled Mr. Madison's execution for January 25, 2018. Panetti v. Quarterman, 551 U.S. 930, 947 (2007) ("[C]laims of incompetency to be executed remain unripe at early stages of the proceedings."). The evidence bearing on this question consists both of the previously submitted evidence documenting Mr. Madison's previous strokes, encephalomacia, small vessel ischemia, and diagnosis of vascular dementia, see Panetti, 551 U.S. at 950 (relying on "extensive evidence of mental dysfunction considered in earlier legal proceedings" as evidence demonstrating threshold showing of insanity), as well as the fact that as a result of this degenerative disease, Mr. Madison continues to decline. These assertions are not in dispute.

To the extent that the State labels recent evidence about the court-appointed expert, Dr. Kirkland, a "red herring," Resp't's Br. Opp'n. 16, the State misunderstands and mischaracterizes Mr. Madison's contentions. The evidence of Dr. Kirkland's drug addiction, suspension from practice and felony charges was relevant not just to impeaching his opinion, see Charles Gamble, McElroy's Alabama Evidence, § 141.01(3) (6th ed. 2009) (witness's substance use relevant and admissible concerning inability to observe, remember or narrate), but calls into question the entire basis for the circuit court's determination that Mr. Madison was competent to be executed. Given the heightened importance of

expert evaluations and testimony in the context of competency-to-be-executed claims, such evidence is critically and obviously important. Panetti, 551 U.S. at 962.

The State also argues that certiorari is inappropriate because Mr. Madison "invited error" by filing a challenge to his competency to be executed pursuant to Alabama Code Section 15-16-23. The State incorrectly argues that Mr. Madison's claim actualiy is a "non-insanity Eighth Amendment claim" and that as a result he should have filed his petition in a different forum. Resp't's Br. Opp'n. 11-12. This argument is not only unavailing, but it serves to reinforce the appropriateness of certiorari in this case.

Alabama law provides only one vehicle for Mr. Madison to challenge his competence to be executed (whatever the origin of the incompetence): Alabama Code Section 15-16-23.[2] There is no right to appeal the denial of these claims, Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995) , and federal habeas review is not available for a merits determination without first meeting

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[2] Rule 32 of the Alabama Rules of Criminal Procedure, cited by the State, provides no basis for relief on claims of incompetence to be executed as such claims do not challenge the underlying conviction or sentence, see Ala. R. Crim. P. 32.1(a), (c), (e), the jurisdiction of the trial court, see Ala. R. Crim. P. 32.1(b), or an unlawful detainment despite the expiration of a sentence, see Ala. R. Crim. P. 32.1(d). The only question raised by a prisoner's competency-to-be-executed challenge is "not whether, but when, his execution may take place." Ford v. Wainwright, 477 U.S. 399, 425 (1986) (Powell, J., concurring in part and concurring in the judgment).

the "demanding standard" of the AEDPA, Dunn v. Madison, 138 S. Ct. 9, 11 (2017). Given that no state appellate court is permitted to review the critical question of competency in this case, and given the limited opportunity this Court has to review such claims "outside of the AEDPA context," certiorari should be granted to review the state circuit's ruling in this case. Id. at 12.

Finally, the State makes one last-ditch argument: that certiorari is not appropriate because "[t]he idea that the inability to recall an event precludes a rational understanding of that event, or its consequences, is absurd." Resp't's Br. Opp'n. 15. But Mr. Madison's challenge is not just an "absurd idea," but rather a claim that his undisputed DSM-5 diagnosis of vascular dementia and related memory impairments render him unable to recall numerous events including the commission of the offense for which he is to be executed. This claim is supported by uncontradicted testimony from Dr. Goff, formed the basis for a finding of incompetence by all three members of the Eleventh Circuit, and is in fact a "substantial question not yet addressed by the Court." Dunn, 138 S. Ct. at 12 (Ginsburg, J., concurring).

Mr. Madison respectfully requests that this Court grant certiorari and stay his scheduled execution in order to address the critical question of whether executing Mr. Madison violates evolving standards of decency and the Eighth Amendment's prohibition against cruel and unusual punishment.

Respectfully Submitted,

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No. 17-7505

In The
Supreme Court of the United States

VERNON MADISON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari To
The Mobile County Circuit Court

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

This Court has granted certiorari to address the following two substantial questions:

1. Consistent with the Eighth Amendment, and this Court's decisions in *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), may the State execute a prisoner whose vascular dementia and cognitive impairment leaves him without memory of the commission of the capital offense and prevents him from having a rational understanding of the circumstances of his scheduled execution?

2. Do evolving standards of decency and the Eighth Amendment's prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes, and where scientific and medical advancements confirm severe cognitive dysfunction and a degenerative medical condition which prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution?

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INTRODUCTION

Vernon Madison has been on Alabama's death row for over 30 years. As a result of multiple, severe strokes over the last several years, Mr. Madison now suffers from vascular dementia, cognitive impairment, and memory loss. He also suffers from encephalomalacia (dead brain tissue), has small vessel ischemia, speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence.

Scientific and medical advancements have allowed experts and courts to confirm the extent of his cognitive decline, and three federal judges concluded that his impaired condition prevented him from having a rational understanding of the execution that the State of Alabama sought to carry out and that his execution was therefore prohibited by the Eighth Amendment. Prior to his most recent scheduled execution date, however, the state trial court, in an unreviewable judgment, concluded that vascular dementia and its attendant cognitive decline and memory loss did not trigger the protections of the Eighth Amendment. This Court has now agreed to resolve the question of whether executing someone with dementia and cognitive brain damage, whose mental disability prevents him from having a rational understanding of his execution, is prohibited by the Eighth Amendment.

OPINIONS BELOW

On January 16, 2018, the Mobile County Circuit Court denied Mr. Madison's petition to suspend his execution because he is incompetent to be executed, filed pursuant to Alabama Code § 15-16-23. (Attached to Petition for Writ of Certiorari as Appendix A.) Section 15-16-23 provides that the trial court's decision "shall be exclusive and final and shall not be reviewed or revised by or renewed before any other court or judge." *See also Weeks v. State*, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995) (dismissing appeal of competency-to-be-executed determination because "[t]he statute clearly states that a finding by the trial court on the issue of insanity, as it relates to this statute, is not reviewable by any other court"). As such, the Mobile County Circuit Court's order is the only order presented for this Court's review.

STATEMENT OF JURISDICTION

Mr. Madison's petition for writ of certiorari was filed on January 18, 2018, and review was granted on February 26, 2018. Jurisdiction is appropriate because the Mobile County Circuit Court is the "highest court of [Alabama] in which a decision could be had." 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Following his arrest for the shooting death of off-duty police officer Julius Schulte on April 18, 1985, Vernon Madison spent the next decade on Alabama's death row illegally convicted. His first conviction by an all-white jury was deemed unconstitutional after state prosecutors were found to have illegally excluded all black veniremembers in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). *Madison v. State*, 545 So. 2d 94, 95-99 (Ala. Crim. App. 1987). At a second trial, prosecutors improperly introduced clearly inadmissible evidence to obtain a conviction which necessitated a second reversal. *Madison v. State*, 620 So. 2d 62, 73

(Ala. Crim. App. 1992). It was not until 1998 that the Alabama appellate courts finally affirmed Mr. Madison's conviction for capital murder, and even that affirmance left unresolved questions about racially biased jury selection and the trial court's override of the death-qualified jury's verdict of life imprisonment without parole. *Ex parte Madison*, 718 So. 2d 904 (Ala. 1998).

Collateral appeals to state and federal courts were pursued by Mr. Madison. The United States Court of Appeals for the Eleventh Circuit eventually remanded the case to the district court for further proceedings based on concerns about the prosecutor's racially biased use of peremptory strikes. Ultimately, the federal courts denied Mr. Madison's petition for habeas corpus relief.[1] *Madison v. Comm'r, Ala. Dep't of Corr.*, 761 F.3d 1240 (11th Cir. 2014). This Court denied certiorari review and subsequently denied Mr. Madison's petition for rehearing on May 18, 2015. *Madison v. Thomas*, 135 S. Ct. 2346 (2015).

During the pendency of this federal court litigation, Mr. Madison began to experience serious medical problems that have now left him severely impaired. As a result of multiple, life-threatening strokes, Mr. Madison has suffered significant brain damage. He now speaks in a dysarthric or slurred manner, is legally

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[1] In denying habeas corpus relief on Mr. Madison's *Batson* claim, the Eleventh Circuit found that "[t]he history of racial discrimination at the Mobile County District Attorney's Office that prosecuted Mr. Madison is significant." *Madison*, 761 F.3d at 1252.

blind, can no longer walk independently, and has urinary incontinence. (*See, e.g.*, Doc. 11-34 at 59 (Holman Prison medical records); Doc. 11-23 at 47 (same); Doc. 8-3 at 16 (expert report of Dr. Goff); Doc. 8-1 at 73-74, 92-93, 104-05 (4/14/16 hearing).)[2] More importantly, he now suffers from vascular dementia and corresponding long-term severe memory loss, disorientation and impaired cognitive functioning.

The most recent of these strokes occurred on January 4, 2016, when prison officials found Mr. Madison unresponsive in his prison cell and fecally incontinent after he suffered a thalamic stroke,[3] which necessitated transfer from Holman Prison to an outside hospital. (Doc. 11-32 at 25 (Holman medical records); Doc.

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[2] The pertinent facts relevant to Mr. Madison's multiple strokes and medical condition were developed in prior litigation and explicitly incorporated into this proceeding. These facts, along with filings and orders of that prior litigation, are all contained in the habeas corpus record and available on PACER. *Madison v. Dunn*, No. 1:16-cv-00191-KD-M (S.D. Ala. 2016). Thus, citations to these facts will be to the document number of the relevant habeas corpus record material, as for example "Doc. 8-3 at 19." Any cites to the hearing held in the Mobile County Circuit Court in 2018 will be as follows: "Hr'g R. at 12."

[3] An MRI confirmed that Mr. Madison suffered a "very small acute CVA," (Doc. 11-60 at 11 (Mobile Infirmary Medical records)), and a "[t]iny focal acute to subacute infarct in the right thalamus," (Doc. 11-60 at 13 (same); *see also* Doc. 8-3 at 19 (Goff report); Doc. 8-1 at 101 (hearing)). "A neurologic symptom or symptom complex caused by cerebral ischemia or hemorrhage is commonly called a cerebrovascular accident (CVA), or stroke." David C. Good, *Cerebrovascular Disease*, *in* Clinical Methods: The History, Physical, and Laboratory Examinations 288, 288 (H. Kenneth Walker, W. Dallas Hall, & J. Willis Hurst, eds. 1990). An "infarct" is, "in lay words, a stroke[.]" (Doc. 8-1 at 101 (hearing).)

11-60 at 11-13 (Mobile Infirmary records).) The thalamus is a "connection organ" that links the limbic system in the lower area of the brain to the frontal lobes, (Doc. 8-1 at 101-02 (hearing)), and when the thalamus is damaged, "the most common thing" that results is memory loss. (Doc. 8-1 at 102 (hearing); *see also* Doc. 8-3 at 19 (Goff report).) After the stroke, Mr. Madison was disoriented, appeared "very confused," and suffered significant loss of memory. (Doc. 8-1 at 101 (hearing); Doc. 8-3 at 19 (Goff report); Doc. 11-52 at 17 (Atmore Hospital medical records); *see also* Doc. 11-60 at 18, 25, 44, 80 (Mobile Infirmary records); Doc. 11-61 at 47 (same).)

Prior to this January stroke, other strokes had contributed to Mr. Madison's cognitive decline. (Doc. 8-1 at 74-75, 104-07 (hearing); Doc. 8-3 at 19 (Goff report).) In May 2015, he suffered a basilar artery occlusion, causing bilateral cerebral and occipital infarctions, and resulting in increased brain pressure, white matter attenuation, and possible temporal lobe damage. (*See, e.g.*, Doc. 11-28 at 43, 46, 50, 52 (Holman medical records); Doc. 11-58 at 10, 12 (USA medical records).) As a result, Mr. Madison was taken to the ICU and a neurosurgeon was placed on standby due to a high risk of fatal brain herniation. (Doc. 11-28 at 46 (Holman medical records); Doc. 11-56 at 13 (USA Medical records).) This stroke, as well as others, compromised his memory and ability to recall basic things about his life and personal history. (Doc. 8-3 at 13 (Goff report); Doc. 8-1 at 104-05 (hearing); Doc. 11-55 at 48 (USA medical records); Doc. 11-56 at 12 (same); Doc. 11-28 at 39-41, 45 (Holman medical records); Doc.

11-34 at 36 (same).) Indeed, since his stroke, he has repeatedly asked for his mother to come and visit him even though she has been dead for years. (Doc. 8-3 at 15, 19 (Goff report); Doc. 8-1 at 101 (hearing).)

Mr. Madison's stroke left him in an "altered mental status," (Doc. 8-3 at 13 (Goff report); Doc. 11-23 at 48-49 (Holman medical records); Doc. 11-28 at 43 (same); Doc. 11-38 at 32 (Atmore Hospital records); Doc. 11-39 at 2 (same); Doc. 11-56 at 13 (USA medical records); Doc. 11-58 at 16 (same)), with a diminished ability to comprehend, (Doc. 11-30 at 14 (Holman medical records)). He was also unaware of where he was or why he was there and became generally confused, a disorientation that continued well after his hospitalization. (Doc. 11-30 at 32, 36 (Holman medical records); Doc. 11-31 at 3, 7, 10 (same); Doc. 11-56 at 12, 15 (USA medical records); Doc. 11-58 at 59 (same).) His speech was slurred, he exhibited signs of an impaired memory, and he could not remember the officers who were guarding him, whom he had known for years. (Doc. 11-30 at 31-32, 36, 39 (Holman medical records); *see also* Doc. 8-3 at 16, 19 (Goff report).) Medical records also document that Mr. Madison suffered strokes prior to the May 2015 incident which negatively impacted his cognitive and bodily functioning. (Doc. 8-3 at 19 (Goff report); Doc. 8-1 at 104 (hearing); Doc. 11-28 at 2 (Holman medical records documenting 2014 infarct in pons); Doc. 11-29 at 36 (same); Doc. 11-30 at 3 (same); Doc. 11-40 at 10 (Atmore Hospital records noting "old" infarcts); Doc. 11-49 at 14 (same); Doc. 11-35 at 3, 8 (Holman medical records documenting vision deterioration due to 2014 stroke).)

As a result of these strokes, Mr. Madison now suffers from encephalomalacia, (Doc. 11-60 at 41, 49, 141 (Mobile Infirmary records); Doc. 11-27 at 30 (Holman medical records); Doc. 11-52 at 5 (Atmore Hospital records); Doc. 8-1 at 106 (hearing)), which means that there are areas of his brain where the tissue is dead. (Doc. 8-1 at 105-06 (hearing)). An MRI in January 2016 depicted encephalomalicia in the occipital lobes and cerebellar hemispheres, and indicated that the size of the dead tissue had increased since the last stroke occurred in May 2015. (Doc. 11-60 at 12-13 (Mobile Infirmary records); Doc. 8-1 at 106-07 (hearing); Doc. 11-52 at 5 (Atmore Hospital records).)

Mr. Madison suffers from additional, chronic medical conditions that have led to worsening capacity for rationally understanding his circumstances, including chronic small vessel ischemia which is recognized as a leading cause of cognitive decline.[4] (Doc. 8-3 at 19 (Goff report); Doc. 8-1 at 73-74, 105-06 (hearing).) He also suffers from occipital angioma – an abnormal collection of blood vessels – which likely contributed to his strokes and debilitating headaches. (Doc. 11-23 at 18 (Holman medical records); Doc. 11-27 at 35 (same); Doc. 11-29 at 36 (same).)

At the 2016 hearing on his competency-to-be-executed challenge, Mr. Madison was confined to a wheelchair. The trial court found that he "appeared to

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[4] *See* John G. Baker et al., *Cerebral Small Vessel Disease: Cognition, Mood, Daily Functioning, and Imaging Findings from a Small Pilot Sample*, 2 Dementia & Geriatric Cognitive Disorders Extra 169, 169 (2012).

be a physically ill individual" and that it was "difficult to tell if Madison was following all of the testimony or not." (Doc. 8-2 at 157 (trial court order of 4/29/16).)

At that hearing, unrebutted evidence was presented that Mr. Madison suffers from a major vascular neurocognitive disorder, *see* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 621 (5th ed. 2013) [hereinafter "DSM-5"], or vascular dementia, which was caused in part by the thalamic stroke he suffered in January 2016. (Doc. 8-3 at 19 (Goff report); Doc. 8-1 at 101-02, 107 (hearing); Doc. 11-60 at 13 (Mobile Infirmary records).) Dr. John Goff, a licensed neuropsychologist who, at Mr. Madison's request, conducted extensive neuropsychological testing and evaluated Mr. Madison's competence to be executed, determined that Mr. Madison's cognitive and bodily functioning has declined significantly as a result of multiple strokes suffered over the last several years, and as a result of other medical conditions with which he is afflicted. (Doc. 8-1 at 105, 108-09 (hearing); Doc. 8-3 at 16-19 (Goff report).)

Dr. Goff's testimony established that the thalamic stroke that occurred in 2016 is particularly relevant to Mr. Madison's competency because it resulted in significant cognitive injuries and memory loss as well as a diminished capacity for rationally understanding his circumstance. (Doc. 8-3 at 19 (Goff report); Doc. 8-1 at 101-04 (hearing).) Dr. Goff diagnosed Mr. Madison with vascular dementia due to the onset of cognitive deficits, including memory loss, that were temporally related to a "hard marker in the medical records . . . [,] on the

MRI"; in this case, the thalamic stroke. (Doc. 8-1 at 107-08 (hearing)); DSM-5 at 621-22 ("Neuroimaging (magnetic resonance imaging [MRI] or computed tomography [CT]) evidence of cerebrovascular disease comprises one or more of the following . . . a strategically placed single infarct or hemorrhage (e.g., in agular gyrus, thalamus, basal forebrain). . . .").

Consistent with that diagnosis, Mr. Madison suffers from resulting retrograde amnesia which means that his episodic memory – memory related to events that happened to him in the past – has significantly declined. (Doc. 8-3 at 19 (Goff report); Doc. 8-1 at 102, 107 (hearing).) Consequently, Mr. Madison cannot remember numerous events that have occurred over the past 30 years. Dr. Goff's examination revealed that Mr. Madison cannot independently recall the facts of the offense; the sequence of events from the offense, to his arrest, to his trial or previous legal proceedings in his case; or the name of the victim. (Doc. 8-3 at 18-19 (Goff report); Doc. 8-1 at 101, 107, 110, 119-20 (hearing).)

These findings are consistent with Dr. Goff's neuropsychological testing, which revealed that Mr. Madison has an IQ score of 72, placing him in the borderline range of intelligence and confirming a significant decline from his previous scores. (Doc. 8-3 at 17, 20 (Goff report); Doc. 8-1 at 97 (hearing).) Mr. Madison has a Working Memory Score of 58, demonstrating severe memory deficits. (Doc. 8-3 at 17 (Goff report); Doc. 8-1 at 97-98 (hearing).) The Working Memory Index is scored on a scale that is similar to an IQ test in which 100 is the mean and the standardization is 15.

(Doc. 8-1 at 98 (hearing).) As Dr. Goff explained in his report, Mr. Madison's "memory skills in regard to working memory fall within the severely impaired range with scores comparable to IQ test scores in the 50's," thereby placing him "within the borderline to intellectually disabled range."[5] (Doc. 8-3 at 19 (Goff report)).

Testing revealed additional evidence of Mr. Madison's memory impairments: Mr. Madison could not recall any of the 25 elements in a brief story vignette Dr. Goff read him, could not remember the alphabet past the letter G, could not perform serial three additions, and could not remember the name of the previous United States President. Mr. Madison named Guy Hunt, who had left office nearly 25 years earlier, as the governor of Alabama,[6] and could not remember the name of the warden at Holman Prison, where he is incarcerated. (Doc. 8-3 at 16 (Goff report).) There is also evidence Mr. Madison has difficulty rationally processing basic information. During the examination, Dr. Goff noted that Mr. Madison was unable to rephrase simple sentences or perform simple mathematical calculations. (Doc. 8-3 at 18 (Goff report).) Dr. Goff concluded that these deficits likely resulted from the

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[5] His functioning is thus akin to the functioning of an individual for whom the death penalty has been held to be categorically unavailable under the Eighth Amendment. *See Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

[6] Guy Hunt was governor of Alabama from 1987-1993. *Alabama Governors*, Ala. Dep't of Archives and History, http://www.archives.alabama.gov/govslist.html (last visited May 22, 2018).

January stroke. (Doc. 8-3 at 19 (Goff report).) Finally, Dr. Goff's administration of the "21-Item Test," as well as his clinical interview, confirmed that he did not see any clinical indications for "malingering or dissimulation," and that Mr. Madison "put forth a genuine effort in regard to his attempts to communicate with me and in regard to the psychometrics administered." (Doc. 8-3 at 17 (Goff report).)[7]

Dr. Goff clarified that the memory loss and cognitive decline seen in patients with dementia is pathological, and therefore is distinct from typical memory loss or forgetfulness many people see as they age; that individuals with dementia will vary in their presentation and can have an inconsistent memory; and that a diagnosis of dementia means Mr. Madison's cognitive functioning will likely continue to decline. (Doc. 8-1 at 108-09 (hearing)); *see also* Susan L. Mitchell, *Advanced Dementia*, 372 New Eng. J. Med. 2533, 2533 (2015) ("Dementia is a progressive, incurable illness.").

Focusing on Mr. Madison's understanding of the reason for the execution, Dr. Goff attempted to employ a checklist of interview questions specifically designed

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[7] Dr. Goff was previously involved in a competency-to-be-executed challenge in Mississippi where the petitioner claimed incompetency due to global amnesia as a result of a head injury. In that case, however, Dr. Goff found that "Simon was either malingering memory deficits or, generously stated, that he could not rule out malingering as an explanation for Simon's behavior." *Simon v. Fisher*, 641 F. App'x 386, 389 (5th Cir. 2016). Habeas corpus relief was ultimately denied, in part due to Dr. Goff's report.

to evaluate a prisoner's competency to be executed,[8] although he was unable to complete the outline because of Mr. Madison's "tendency to repeat himself and his tendency to go off on tangents." (Doc. 8-3 at 16 (Goff report).) Ultimately, Dr. Goff concluded that Mr. Madison does not "seem to understand the reasoning behind the current proceeding as it applies to him" and does not understand why he is scheduled to be executed by the State. (Doc. 8-3 at 19-20 (Goff report); Doc. 8-1 at 110, 119-20 (hearing).) In response to direct questioning by the state trial judge at the hearing, Dr. Goff testified that while Mr. Madison may understand that the State is seeking retribution, he does not "understand[ ] the act that he's being – that he's being punished for." (Doc. 8-1 at 120 (hearing).)

The court-appointed expert, Dr. Kirkland,[9] did not dispute the physical and cognitive decline that Mr.

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[8] As noted in his evaluation, (Doc. 8-3 at 16, 18 (Goff report)), Dr. Goff utilized a checklist published in the journal Behavioral Sciences and the Law. *See* Patricia A. Zapf, Marcus T. Boccaccini, & Stanley L. Brodsky, *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist*, 21 Behav. Sci. & L. 103 (2003).

[9] At the time of the hearing, Dr. Kirkland had a long-standing contract with the State of Alabama. (Doc. 8-1 at 68 (hearing).) Dr. Kirkland has since been suspended from the practice of psychology, *see* Ala. Bd. of Exam'rs in Psychology, Psychologist Search or License Verification, www.psychology.state.al.us/licensee.aspx (search "Karl Kirkland") (last visited May 22, 2018), after being arrested and charged with four felony counts of Unlawful Possession or Receipt of a Controlled Substance. These charges arose from his use of forged prescriptions to illegally obtain narcotics on four separate occasions, including on April 18, 2016, just four days after the competency hearing in this case and less than two weeks

Madison experienced as a result of his multiple strokes, (Doc. 8-1 at 74 (hearing)), nor did he find any indication that Mr. Madison was malingering. (Doc. 8-3 at 9 (Kirkland report).) Dr. Kirkland reported that Mr. Madison was able to accurately discuss the history of his appeals, (Doc. 8-1 at 71, 78-79, 123-24 (hearing)), but never testified as to whether Mr. Madison could remember the crime or to his ability to rationally understand the connection between the crime and his scheduled execution. *Madison v. Comm'r, Ala. Dep't of Corr.*, 851 F.3d 1173, 1185-86, 1187 (11th Cir. 2017), *rev'd sub nom. Dunn v. Madison*, 138 S. Ct. 9 (2017).

The trial court denied relief based on a view that Mr. Madison's diagnosed vascular dementia and attendant cognitive and memory deficits were not relevant to the determination of Mr. Madison's competency-to-be-executed. *Id.* at 1188 ("The court never considered the impact of Mr. Madison's memory loss or his belief that he never killed anyone on his ability to make the required connection between his crime and execution."). However, based on this evidence in habeas corpus proceedings, all three Eleventh Circuit judges agreed that Mr. Madison did not have a rational understanding of the link between the crime and his scheduled execution, and was therefore incompetent to be executed. *Id.* at 1189-90; *id.* at 1190 (Jordan, J., dissenting) ("After reviewing the record, I believe that

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after his evaluation of Mr. Madison. *See State v. Kirkland*, Nos. DC-2016-002143.00 (April 18, 2016), DC-2016-002144.00 (June 6, 2016), DC-2016-002145.00 (June 22, 2016), DC-2016-002146.00 (June 27, 2016) (Dist. Ct. Montgomery County).

Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him at this time . . . .").

This Court reversed the Eleventh Circuit's grant of habeas corpus relief, but declined to express a view on "the merits of the underlying question" of Mr. Madison's competency-to-be-executed. *Dunn v. Madison*, 138 S. Ct. 9, 12 (2017). A second execution date was set for January 25, 2018.

On the basis of new evidence about the credibility, reliability and validity of Dr. Kirkland's prior opinions and his suspension from the practice of psychology, *see supra* note 9, as well as the progressive and degenerative nature of his vascular dementia, and his continued mental and physical decline, Mr. Madison once again challenged his competency to be executed in the Mobile County Circuit Court on December 18, 2017. At a hearing on the petition in the Mobile County Circuit Court, the State did not contradict the allegations regarding Dr. Kirkland and the trial court accepted them as true. Hr'g R. at 32. Nevertheless, relying on the evidence that had been previously presented, the state trial court denied Mr. Madison's petition. Cert. Pet. App. A.

SUMMARY OF ARGUMENT

In *Ford v. Wainwright*, this Court concluded that "evolving standards of decency that mark the progress of a maturing society" dictate that the penological justifications for imposing the death penalty are not

served by the execution of someone who is incompetent and that it is therefore prohibited by the Eighth Amendment. 477 U.S. 399, 409-10 (1986). In *Panetti v. Quarterman*, the Court reaffirmed the basic premise of *Ford*, noting that "today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." 551 U.S. 930, 957 (2007) (quoting *Ford*, 477 U.S. at 409-10).

As a result of several strokes and declining health, Vernon Madison, who has been on Alabama's death row for over 30 years, now suffers from vascular dementia, cognitive deficits, severe memory loss and brain damage. He does not remember the crime for which he has been convicted and does not have a rational understanding of why the state of Alabama seeks to execute him.

The lower court rejected Mr. Madison's claim for relief under *Ford* largely because dementia and neurological disease were seen as outside the scope of protection under the Eighth Amendment. This Court's precedents do not support that conclusion, and instead require that states refrain from executing an individual whose verifiable cognitive impairments render him incompetent to rationally understand the circumstances surrounding a scheduled execution. No penological justification or retributive value can be found in executing a severely impaired and incompetent prisoner, especially where advances in neurological science now make clear the nature of this

incompetency. The execution of Vernon Madison consequently is prohibited by the Eighth Amendment's essential commitment to human dignity.

ARGUMENT

I. The Eighth Amendment Bars the Execution of an Individual Who Lacks the Ability to Understand Why He Is Being Executed.

In 1976, this Court reauthorized application of the death penalty in a series of cases with the express condition that any execution must still "comport[] with the basic concept of human dignity at the core of the [Eighth] Amendment." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (upholding Georgia's death penalty scheme); *see also Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (North Carolina's mandatory death penalty scheme violated Eighth and Fourteenth Amendments); *Roberts v. Louisiana*, 428 U.S. 325, 334 (1976) (Louisiana's mandatory death penalty statute failed to comply with "requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences").

Since that time, this Court has endeavored to "enforce the Constitution's protection of human dignity," *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014), by limiting the application of capital punishment to those who commit the most serious crimes and those with the most extreme culpability. Thus, the Court has banned

the execution of prisoners whose crimes do not meet the penological justification necessary for the extreme punishment of death. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407 (2008) (death penalty disproportionate for nonhomicide offense of rape of child); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty disproportionate for crime of rape of adult woman); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty disproportionate for person who aids and abets but does not kill, attempt to kill, or intend to kill).

This Court has also banned the execution of prisoners whose diminished culpability, by virtue of age or intellectual disability, rendered the death penalty excessive and cruel. *See Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth Amendment forbids execution of juvenile offenders under 18 at time of crime); *Atkins v. Virginia*, 536 U.S. 304 (2002) (execution of intellectually disabled violates Eighth Amendment's prohibition on cruel and unusual punishment).

In *Ford v. Wainwright*, this Court concluded that "evolving standards of decency that mark the progress of a maturing society" dictate that the penological justifications for imposing the death penalty are not served by the execution of someone who is incompetent and that it is therefore prohibited by the Eighth Amendment. 477 U.S. 399, 409-10 (1986). Subsequently, in *Panetti v. Quarterman*, this Court reaffirmed the basic premise of *Ford*, noting that "today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of

his fundamental right to life." 551 U.S. 930, 957 (2007) (*quoting Ford*, 477 U.S. at 409-10).[10]

Ford's and *Panetti*'s commitment to protecting the incompetent from execution under the Eighth Amendment is informed by a tragic history of punishment where vulnerable people have sometimes been treated cruelly by state governments. The forcible sterilization of thousands of women deemed "mental defectives," the castration of "confirmed criminals,"[11] and the use of lobotomies upon and compulsory institutionalization of people based on their sexual orientation[12] are

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[10] All relevant opinions decided prior to *Ford* concerned only procedural questions presented related to competency-to-be-executed claims under the Fourteenth Amendment. 477 U.S. at 405 (distinguishing prior cases on "adequacy of procedures" from "substantive restriction" held to apply).

[11] In 1907, Indiana was the first state to enact a compulsory sterilization law, in order to "prevent procreation of confirmed criminals, idiots, imbeciles and rapists." 1907 Ind. Acts 377; Note, *Regulating Eugenics*, 121 Harv. L. Rev. 1578, 1580 (2008) ("Starting with Indiana in 1907, twenty-nine states enacted compulsory sterilization laws[.]") In 1927, this Court upheld a Virginia law permitting the forcible sterilization of women deemed to be "mental defectives," finding that "[i]t is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." *Buck v. Bell*, 274 U.S. 200, 207 (1927) (citation omitted). Between the 1920s and the 1970s, over 60,000 Americans with mental illness or developmental disabilities were forcibly sterilized. Kim Severson, *Thousands Sterilized, a State Weighs Restitution*, N.Y. Times, Dec. 9, 2011, https://www.nytimes.com/2011/12/10/us/redress-weighed-for-forced-sterilizations-in-north-carolina.html.

[12] *See* Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 787-89 (2002) (discussing use of castration, lobotomy, clitoridectomy,

clear reminders of why this Court has interpreted the Eighth Amendment as being centrally concerned about human dignity and protection against cruel punishment. Consequently, the execution of a prisoner compromised by dementia and cognitive injury presents a critically important issue. Despite the fact that Alabama has by statute made competency-to-be-executed claims a "second class" concern unworthy of appellate review where a trial judge's determination is final, this Court in *Ford* and *Panetti* made clear that preventing the execution of the incompetent is a central requirement of the Eighth Amendment.

This Court's precedent exempts from execution "a category of defendants defined by their mental state," *Ford*, 477 U.S. at 419 (Powell, J., concurring), and in both *Ford* and *Panetti*, this Court declined to limit the underlying disorders that can give rise to a finding that a prisoner is incompetent.

In *Ford*, for example, this Court did not specifically define the source of a person's (or "mad man['s]") "mental condition," "sanity," "diagnoses," "nonsane memory," "mental awareness," or "capacity" that could give rise to a competency claim, but sought only to distinguish where a lack of rational understanding would separate those whom society could execute and those for whom

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electroshock therapy, and more "medical conversion treatments for homosexuality"); Gregory M. Herek, *Sexual Orientation Differences as Deficits: Science and Stigma in the History of American Psychology*, 5 Persp. on Psych. Sci. 693, 695 (2010) (discussing "indefinite confinement in a psychiatric institution until they were declared cured").

death would be cruel and unusual. *Id.* at 404, 407, 409, 419, 421. In erecting the Eighth Amendment bar, *Ford* refused to limit what evidence, i.e., what diagnoses, test results, brain scans, or behavior, is required to meet the standard for incompetence.

And in *Panetti*, this Court reflected that *Ford* "discussed the substantive standard at a high level of generality." 551 U.S. at 957. As such, the *Panetti* opinion likewise speaks variously of "mental state," "mental illness," "mental disorder," and "psychological dysfunction," fully rejecting any call "to amplify [the Court's] conclusions or to make them **more precise**." *Id.* at 959-61 (emphasis added); *see also id.* 551 U.S. at 953 (recognizing "the standard is stated in general terms").[13] This lack of precision reflects the Court's understanding that there are multiple circumstances that could give rise to a prisoner's incompetency.

Indeed, *Panetti* presents the only occasion on which this Court has ever commented on what affliction might meet the standard for incompetence, and it did so in a way that would preclude a narrowing of the

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[13] Although the test articulated by *Panetti* is seemingly broad, in practice it has rarely disrupted the State's ability to execute condemned prisoners. Indeed, of the 1,308 death-sentenced inmates who were eligible to file a *Ford* claim between 1986 and July 2013 – many of whom have been estimated to have some form of mental illness – 93% did not even raise a competency-to-be-executed challenge. John H. Blume, Sheri Lynn Johnson, & Katherine E. Ensler, *Killing the Oblivious: An Empirical Study of Competency To Be Executed Litigation*, 82 UMKC L. Rev. 335, 343-44 (2014). In only twenty-one of these cases was the prisoner found incompetent to be executed. *Id.*

inquiry. Specifically, in *Panetti*, the prisoner sought to establish incompetency by demonstrating that his delusional belief system obstructed a rational understanding of the State's reason for his execution. *Id.* at 956-58. In finding the prisoner competent to be executed, the Fifth Circuit Court of Appeals treated the prisoner's delusional beliefs as irrelevant because the prisoner was "aware that he committed the murders, . . . aware that he will be executed; and . . . aware that the reason that the State has given for the execution is his commission of the crimes in question." *Id.* at 956. This Court overturned the lower court, finding no support in *Ford* for the proposition that "a prisoner is automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reason for his execution." *Id.* at 959. Such a standard is "too restrictive to afford a prisoner the protections granted by the Eighth Amendment" where it rendered certain features of petitioner's mental disorder irrelevant to the determination of competency once it was determined that the prisoner is "aware the State has identified the link between his crime and the punishment to be inflicted." *Id.* at 956-57, 960.

Panetti thus found that the refusal to consider evidence demonstrating incompetency once a court has found that a prisoner is aware of the stated reason for his execution "is to mistake *Ford*'s holding and its logic." *Id.* at 960. Rather, a reviewing court must not limit consideration of mental disorders that "so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the

execution." *Id.* at 958. "If anything," this Court found in *Panetti*, "the *Ford* majority suggests the opposite." *Id.*[14]

Despite *Panetti*'s insistence that courts cannot treat evidence of mental impairments or disorders as "irrelevant" to the competency determination once it concludes that the defendant is aware of the stated reason for his execution, the trial court in this case did just that when rejecting Mr. Madison's claim. That is, the court below disregarded the medical and scientific evidence that Mr. Madison suffers from dementia and

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[14] In other contexts, courts have increasingly found that people with dementia and neurological disorders may require legal protection due to diminished capacity similar to other bases for incompetency. *See, e.g.*, *In re Estate of Bragdon*, 875 A.2d 697, 700 (Me. 2005) (appointment of full guardian necessary due to individual's dementia); *Ivie v. Smith*, 439 S.W.3d 189, 194, 201, 207 (Mo. 2014) (en banc) (finding lack of capacity where testator exhibited memory loss and brain testing consistent with diagnosis of vascular dementia); *Riddell v. Edwards*, 32 P.3d 4, 9-10 (Alaska 2001) (court required to protect individual diagnosed with dementia and attendant confusion and inability to manage financial affairs); *Darr v. Billeaudeau*, 541 S.W.3d 460, 466 (Ark. Ct. App. 2018) (protection required where medical records documented diagnosis of dementia and individual demonstrated "memory loss, confusion, . . . decreased judgment, [and] cognitive decline"); *In re Estate of Flowers*, 88 N.E.3d 599, 611, 622-23 (Ohio Ct. App. 2017) (incompetency declared where evidence from medical experts demonstrated significant memory loss and impairment of executive functioning as result of dementia); *In re Estate of Lynch*, 350 S.W.3d 130, 137-40 (Tex. App. 2011) (affirming jury finding of incapacity because individual had "irreversible strokes that led to a diagnosis by his neurologist that he had dementia" and exhibited "memory loss" and "impaired executive function").

corresponding memory deficits[15] because, at the State's continued insistence, the court determined that vascular dementia constitutes a different medical condition than what this Court has recognized as triggering the Eighth Amendment protections of *Ford* and *Panetti*.[16] And, when Mr. Madison challenged his most recent execution date due to his same progressive and degenerative condition, the lower court again concluded that Mr. Madison's disorder did not implicate the protections of *Ford* and *Panetti*.

II. The Penological Objectives of the Eighth Amendment Cannot Be Squared with the Execution of a Prisoner Whose Vascular Dementia and Associated Cognitive Decline Leave Him Without a Memory of the Commission of the Crime or a Rational Understanding of Why He Is to Be Executed.

Vernon Madison suffers from vascular dementia, which has resulted in a brain injury, a decline in cognitive functioning and significant memory impairment. (Doc. 8-1 at 107-08 (hearing).) Consequently, Mr.

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[15] At no point in the initial order denying relief did the state trial judge even mention Mr. Madison's diagnosed dementia, (Doc. 8-2 at 149-58), even though this diagnosis was never disputed by the court's own expert, Dr. Kirkland. (Doc. 8-1 at 123-24 (hearing).)

[16] Throughout this litigation, the State has consistently argued that Mr. Madison's claim should fail because vascular dementia, and associated cognitive and memory impairments, is not considered a mental illness and thus does not implicate *Ford* and *Panetti*. *See, e.g.*, Br. in Opp'n 14-16; Hr'g R. at 17-18; (Doc. 8-2 at 140-41, 143-44 (State's brief after 2016 hearing)).

Madison cannot remember numerous events that have occurred over the past thirty years or more. (Doc. 8-3 at 19 (Goff report).) He cannot independently recall the facts of the offense; the sequence of events from the offense to his arrest, to his trial or previous legal proceedings in his case; or the name of the victim, and as a result he does not have a rational understanding of why he faces execution. (Doc. 8-3 at 18-19 (Goff report); Doc. 8-1 at 101, 107, 110, 119-20 (hearing).) He similarly cannot rationally understand a range of relevant features connected to his death sentence and confinement.

In evaluating Mr. Madison's competency to be executed, Dr. Goff testified that he was attempting to find the answer to two questions: "One is there[ ] something wrong with him, and the other thing is does what's wrong with him cause him to be incompetent." (Doc. 8-1 at 117 (hearing).) In this framework, whether an individual "forgets particular phrasing" or "begin[s] to forget certain things" does not invariably indicate that the person is incompetent; rather, it means that "there's something is wrong with him." (Doc. 8-1 at 117 (hearing).) And, in Dr. Goff's reasoned professional opinion based on his evaluation of Mr. Madison, the review of significant medical records, and numerous neuropsychological tests, the "thing" that was wrong with Mr. Madison was that his brain had been traumatized, leading to a DSM-5 diagnosis of vascular dementia and corresponding cognitive and memory decline. (Doc. 8-1 at 107 (hearing); Doc. 8-3 at 20 (Goff report).)

Neuropsychological testing confirmed Mr. Madison's significant cognitive and memory deficits. (Doc. 8-3 at 16-17 (Goff report); Doc. 8-1 at 96-100 (hearing).) Specifically, Dr. Goff's testing established that Mr. Madison has a Working Memory Score of 58. (Doc. 8-3 at 17 (Goff report); Doc. 8-1 at 98 (hearing).) The Working Memory Index is scored on a scale that is similar to an IQ test in which 100 is the mean and the standardization is 15. (Doc. 8-1 at 98 (hearing).) As Dr. Goff explained in his report, Mr. Madison's "memory skills in regard to working memory fall within the severely impaired range with scores comparable to IQ test scores in the 50's." (Doc. 8-3 at 19 (Goff report).) Consistent with these findings, testing demonstrated that Mr. Madison has an IQ of 72, in the borderline range of intelligence and a considerable decline from the past. (Doc. 8-3 at 17, 20 (Goff report); Doc. 8-1 at 97 (hearing).)

Ultimately, Dr. Goff concluded that as a result of his deteriorating medical condition, Mr. Madison does not "seem to understand the reasoning behind the current proceeding as it applies to him" and does not understand why he is scheduled to be executed by the State. (Doc. 8-3 at 18-20 (Goff report); Doc. 8-1 at 110, 119-20 (hearing).) In response to direct questioning by the trial judge at the state court hearing, Dr. Goff testified that while Mr. Madison may understand that the State is seeking retribution, he does not "understand[ ] the act that he's being – that he's being punished for." (Doc. 8-1 at 120 (hearing).) *See Panetti v. Quarterman*, 551 U.S. 930, 959 (2007) (determination of competency

requires inquiry into "prisoner's ability to 'comprehen[d] the reasons' for his punishment" or "a determination into whether he is 'unaware of . . . why [he is] to suffer it' ").

As such, Mr. Madison fits into the category of prisoners for whom an execution would serve no retributive or deterrent purpose. *Ford v. Wainwright*, 477 U.S. 399, 417 (1986); *Panetti*, 551 U.S. at 959. Retribution is served where an offense is offset by a punishment expressing society's "moral outrage," *see Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion), but where, as a result of a deteriorating medical condition, the person being punished has no memory of the commission of the offense for which he is to be executed, the "moral quality" of that punishment is lessened and unable to match outrage over the offense, *Ford*, 477 U.S. at 408. As this Court has explained, retribution is not achieved where "a prisoner's recognition of the severity of the offense" does not match "the objective of community vindication." *Panetti*, 551 U.S. at 958. For purposes of retribution, there is no moral or constitutional distinction between a person who cannot "recogni[ze] . . . the severity of the offense" as a result of delusions and a person who is unable to do so as a result of dementia, cognitive decline, and memory deficits.[17]

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[17] This lack of moral difference is all the more clear considering that the American Bar Association, American Psychiatric Association, American Psychological Association, and the National Alliance of the Mentally Ill support a bar on executing those with dementia. *See* Am. Bar Ass'n, *Recommendation and Report on the*

Nor can executing Mr. Madison be justified on grounds of deterrence. This Court made it plain in *Ford*: the execution of an incompetent person "provides no example to others and thus contributes nothing to whatever deterrence value is intended by capital punishment." 477 U.S. at 407; *Panetti*, 551 U.S. at 958 (same). Whether by delusion or dementia, a lack of rational understanding undermines any potential deterrence objective of capital punishment. Most obvious, with incapacity by virtue of dementia, specific deterrence is already achieved. *Panetti*, 477 U.S. at 958.

Finally, executing Mr. Madison would implicate society's and the Eighth Amendment's aversion to grotesque and obscene punishments. In failing to find retributive and deterrent justifications for executing an incompetent person, this Court recognized the "natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity." *Ford*, 477 U.S. at 409-10. "Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting

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Death Penalty and Persons with Mental Disabilities (2006), *reprinted in* 30 Mental & Physical Disability L. Rep. 668, 668 (2006). These groups have recognized that age of onset is the only difference between an individual who is intellectually disabled, and therefore ineligible for the death penalty, *Atkins v. Virginia*, 536 U.S. 304 (2002), and an individual who suffers from dementia. Am. Bar Ass'n, *Severe Mental Illness and the Death Penalty* 7 (2016). In this case, the evidence demonstrated that Mr. Madison has an unrebutted IQ of 72 as a result of his multiple strokes and cognitive decline. (Doc. 8-3 at 17 (Goff report).)

mindless vengeance," the Eighth Amendment bars executing someone lacking "capacity" and "understanding." *Id.* And this should be true regardless of whether the deficiency is due to delusions, as with Mr. Ford, or dementia, as with Mr. Madison.

III. Medical and Scientific Advancements Have Allowed for Increased Confidence in the Diagnosis of Mental Disorders that Merit Protection Under the Eighth Amendment.

Since *Ford* and *Panetti*, scientific and medical advancements have led to a greater understanding of how neurocognitive disorders manifest in individuals who suffer from cognitive decline, and reliance on such advancements to inform an Eighth Amendment analysis is well-established in this Court's jurisprudence. *See Panetti*, 551 U.S. at 962 ("conclusions of physicians, psychiatrists, and other experts in the field will bear upon the proper analysis"); *see also Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) ("The medical community's current standards supply one constraint on States' leeway [to determine intellectual disability]. Reflecting improved understanding over time, [the DSM-5 and American Association on Intellectual and Developmental Disabilities Manual] offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" (citations omitted)); *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014) ("The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework.");

Miller v. Alabama, 567 U.S. 460, 471 (2012) ("Our decisions rested not only on common sense . . . but on science and social science as well.").[18]

Over the past several decades, scientific and medical advancements have provided not just a deeper insight into the physical presentation of conditions of the brain, but the ability to document and confirm the existence of neurological conditions that clearly impact cognitive functioning in a way that may trigger Eighth Amendment protections. The DSM-5 reflects these advances in neuroscience by including expanded criteria for the diagnosis of dementia, now referred to as "major neurocognitive disorder." DSM-5 at 621. *See* Perminder S. Sachdev et al., *Classifying Neurocognitive Disorders: The DSM-5 Approach*, 10 Nature Reviews Neurology 634, 634 (2014) ("The DSM-IV approach to classifying neurocognitive disorders also contained a number of limitations, which prompted a major revision in the fifth edition (DSM-5).").

These recently expanded diagnostic criteria for vascular neurocognitive disorder, which reflect a more advanced standard of practice than in the DSM-IV,[19] "giv[e] clinicians more guidance in determining

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[18] Reliance on advances in medical standards is particularly appropriate in the context of Eighth Amendment categorical exemptions involving individuals with mental disabilities and disorders, in part because society "relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue." *Hall*, 134 S. Ct. at 1993.

[19] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 161 (4th ed. text revision 2000) [hereinafter "DSM-IV"].

possible etiology," Darrel Regier et al., *The DSM-5: Classification and Criteria Changes*, 12 World Psychiatry 92, 96 (2013), and allow for a more precise understanding of Mr. Madison's limited capacity than was previously accessible. Whereas before, the DSM-IV's diagnostic criteria for vascular dementia directed practitioners to focus primarily on patients' observable cognitive deficits while taking into account any associated neurological symptoms or relevant "laboratory evidence,"[20] the DSM-5 now specifically incorporates the use of neuroimaging as a basis for reaching a more conclusive diagnosis of vascular neurocognitive disorder.[21]

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[20] DSM-IV at 161 (DSM-IV diagnostic criteria for vascular dementia included (A) "[D]evelopment of multiple cognitive deficits manifested by both . . . memory impairment" and disturbances in one or more following areas: "aphasia," "apraxia," "agnosia," and "executive functioning," (B) The cognitive deficits cause "significant impairment in social and occupational functioning and represent significant decline from a previous level of functioning," (C) "Focal neurological signs and symptoms . . . or laboratory evidence indicative of cerebrovascular disease . . . that are judged to be etiologically related to the disturbance," and (D) "The deficits do not occur exclusively during course of delirium.").

[21] DSM-5 at 621 (DSM-5 diagnostic criteria for vascular neurocognitive disorder include (A) "[C]riteria are met for major or mild neurocognitive disorder," (B) "[C]linical features are consistent with vascular etiology," as suggested by temporal link to one or more cerebrovascular events or "evidence for decline is prominent in complex attention . . . and frontal-executive function," (C) "There is evidence of the presence of cerebrovascular disease from history, physical examination, and/or neuroimaging," and (D) "[S]ymptoms are not better explained by another brain disease or systemic disorder."). *See also, e.g.*, DSM-5 at 622 ("Etiological certainty requires the demonstration of abnormalities on neuroimaging.").

These criteria, updated to encompass the "greater information on post-mortem laboratory correlations and clinical progression [that has] become available over the past two decades," Regier, *The DSM-5: Classification and Criteria Changes* at 96, allow clinicians to arrive at more accurate diagnoses that better grasp the particular cognitive consequences of a patient's condition, including patients who suffer from cognitive decline due to formerly undefined reasons.

Technological advances in brain imaging such as magnetic resonance imaging (MRI), the supplementation of brain volumetrics with new technology, and resulting improvements in brain mapping have revolutionized medical and psychiatric researchers' conception of the brain, resulting in an increasingly complex awareness of how and why disorders of the brain originate.[22] Not only have these advances allowed for more precise diagnoses and improved awareness of resulting impairments, they have also revealed the extent to which disorders of the brain are multifaceted.[23] Significantly, improvements in brain science have allowed researchers to more accurately trace the physical etiology of psychiatric disorders, neurological

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[22] *See* Laura S. Khoshbin & Shahram Khoshbin, *Imaging the Mind, Minding the Image: An Historical Introduction to Brain Imaging and the Law*, 33 Am. J. L. & Med. 171, 180-81 (2007); Nitin Williams & Richard Henson, *Recent Advances in Functional Neuroimaging Analysis for Cognitive Neuroscience*, 2 Brain & Neuroscience Advances 1 (2018).

[23] *See, e.g.*, Chiadi U. Onyike, *Psychiatric Aspects of Dementia*, 22 Continuum 600 (2016) (explaining the "complexity of the relationship between psychiatric disorders and dementia").

conditions, and other sources of cognitive impairment, highlighting the range of physical dysfunction that can result in a compromised mental state.[24]

These scientific advancements have had a particularly meaningful impact in the study of neurocognitive disorders.[25] With the benefit of recent technology, lesions on the brain can now be more readily detected, "allowing for links to be drawn between the presence of lesions and the pattern and severity of memory disorder."[26]

Here, brain imaging and testing played a critical role in documenting and confirming Mr. Madison's brain injuries and cognitive decline. Advanced imaging technologies provided a precise location of the

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[24] *See, e.g.*, Bayanne Olabi et al., *Are There Progressive Brain Changes in Schizophrenia? A Meta-Analysis of Structural Magnetic Resonance Imaging Studies*, 70 Biological Psychiatry 88 (2011); Daniel Lindqvist et al., *Psychiatric Disorders and Leukocyte Telomere Length: Underlying Mechanisms Linking Mental Illness With Cellular Aging*, 55 Neuroscience & Biobehavioral Rev. 333 (2015).

[25] *See* Martin Dichgans & Didier Leys, *Vascular Cognitive Impairment*, 120 Circulation Research 573, 573 (2017) ("Recent advances in neuroimaging, neuropathology, epidemiology, and genetics have led to a deeper understanding of how vascular disease affects cognition.").

[26] Narinder Kapur & Michael Kopelman, *Advanced Brain Imaging Procedures and Human Memory Disorder*, 65 Brit. Med. Bull. 61, 63 (2003) ("The ability to form three-dimensional images of lesions . . . and to visualize their location in relation to key anatomical structures and in relation to critical white matter tracts, may provide the physician and the neurosurgeon with a clearer idea of the size of a lesion and of its location vis-à-vis critical anatomical regions that have a role in memory functioning.").

cerebrovascular accidents Mr. Madison has experienced over the last few years and revealed the progression of cerebral atrophy and encephelomalacia with greater certainty. For example, to discern the "[t]iny focal acute to subacute infarct in the right thalamus" that Mr. Madison experienced in January 2016, doctors utilized "[m]ultiple sequence MRI images of the brain including DWI." (Doc. 11-60 at 13 (Mobile Infirmary records).) After Mr. Madison's May 2015 stroke, a CT angiogram was used to identify occlusion of the basilar artery, the event giving rise to the stroke, (Doc. 11-56 at 13 (USA medical records)). Use of both DWI, or diffusion weighted imaging, and CT angiograms only became widespread in clinical practice in the mid-1990s.[27]

In 2014, Mr. Madison underwent an MRI using a "fluid-attenuated inversion recovery" sequence, or FLAIR sequence, which identified "a chronic infarct in the inferior left side of the pons." (Doc. 11-28 at 2 (Holman medical records).) As with the DWI and a CT angiogram, use of a FLAIR sequence in brain imaging was only devised in the early 1990s.[28] The same MRI in 2014 also used a gadolinium-based contrast agent to enhance the resulting images taken of Mr. Madison's

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[27] *See, e.g.*, Susumu Mori & Peter B. Barker, *Diffusion Magnetic Resonance Imaging: Its Principle and Applications*, 257 Anatomical Rec. 102, 108 (1999); Geoffrey D. Rubin et al., *CT Angiography After 20 Years: A Transformation in Cardiovascular Disease Characterization Continues to Advance*, 271 Radiology 633, 634 (2014).

[28] Beatrice De Coene et al., *MR of the Brain Using Fluid-Attenuated Inversion Recovery (FLAIR) Pulse Sequences*, 13 Am. J. Neuroradiology 1555, 1563 (1992).

brain (Doc. 11-28 at 2 (Holman medical records)), yet such a contrast enhancement agent did not become fully available until after *Ford*.[29]

Consistent with this new technology and knowledge, it is now undisputed that Mr. Madison is severely compromised by vascular dementia, brain injury, cognitive decline, memory loss and a diminished capacity to rationally understand what he is experiencing. After reviewing an imaging report following Mr. Madison's 2016 stroke, which showed an infarct in the right thalamus (Doc. 11-60 at 11, 13 (Mobile Infirmary records)), Dr. Goff was then able to explain Mr. Madison's significant memory loss in light of the damage to this portion of his brain. (Doc. 8-3 at 19 (Goff report); Doc. 8-1 at 101-04 (hearing).) Thus, the technologies that permitted Dr. Goff to conclude that Mr. Madison is incompetent to be executed demonstrate the evolving landscape of evidence allowing courts to adequately review maladies that could give rise to incompetence. Advances in knowledge and new insights about dementia, cognitive decline and competency are not just relevant to the evolving standards of decency that define the Eighth Amendment's core values, but essential to prevent cruel and unusual punishment.

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[29] *See* Jessica Lohrke et al., *25 Years of Contrast-Enhanced MRI: Developments, Current Challenges and Future Perspectives*, 33 Advances in Therapy 1, 2 (2016).

CONCLUSION

The Eighth Amendment's essential commitment to human dignity, as expressed through the "evolving standards of decency" requires that states refrain from executing an individual whose verifiable cognitive impairments render him incompetent to rationally understand the circumstances surrounding a scheduled execution.

This Court should reverse the lower court's judgment and conclude that Vernon Madison's execution is prohibited by the Eighth Amendment and the standards set forth by this Court in *Ford* and *Panetti*.

Respectfully submitted,

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No. 17-7505

In the Supreme Court of the United States

VERNON MADISON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ of Certiorari to the the Mobile County Circuit Court

BRIEF OF RESPONDENT

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July 31, 2018

QUESTIONS PRESENTED
(Capital Case)

Although the Court granted certiorari on these two questions, Madison's brief changes the first question presented. The following are the questions on which the Court granted certiorari, not the questions as rephrased in Madison's brief.

(1) Consistent with the Eighth Amendment, and this Court's decisions in *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), may the State execute a prisoner whose mental disability leaves him without memory of his commission of the capital offense?

(2) Do evolving standards of decency and the Eighth Amendment's prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes causing severe cognitive dysfunction and a degenerative medical condition which prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution?

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INTRODUCTION

This case is about the State's sovereign power to impose a just and constitutional punishment on a violent criminal who murdered one of the State's own law enforcement officers. From the State's perspective, the question is not just whether Madison may be punished for violating the State's criminal laws. It is whether the State can "assure that there will be a police force to see that the criminal laws are enforced at all." *Roberts v. Louisiana*, 431 U.S. 633, 647 (1977) (Rehnquist, J., dissenting).

For his part, Madison clearly intends to "claim that he has become insane" no matter "the number of prior adjudications of the issue, until the very moment of execution." *Ford v. Wainwright*, 477 U.S. 399, 429 (1986) (O'Connor, J., concurring in part and dissenting in part). Madison first claimed that he could not remember murdering Officer Schulte in 1990, long before he purportedly suffered from dementia-related amnesia. On the eve of his scheduled execution in 2016, he asserted incompetence for the same memory failure but blamed it on two recent strokes. After the Court rejected his position last year, *see Dunn v. Madison*, 138 S. Ct. 9 (2017), Madison filed a new petition in the same state court under the same case number to make the same allegations based on the same evidence.

The Court granted certiorari again to address the question Justice Ginsburg noted last year: "whether a State may administer the death penalty to a person whose disability leaves him without memory of his commission of a capital offense." *Id.* at 12 (Ginsburg, J., concurring). But Madison's brief expressly changes the question presented from the one he posed in his certiorari petition. *Compare* Cert. Pet. at i *with*

Pet. Br. at i. And that brief proposes no cogent theory for why the Constitution would bar the execution of a prisoner "without memory" of his capital offense.

Despite Madison's arguments to the contrary, the trial court did not hold that dementia-related infirmities can never render a person incompetent to be executed. Instead, the trial court held that *Madison's* dementia does not render *him* incompetent to be executed. As we explained the last time we came before this Court, Madison understands that he is being punished for a murder he committed and for which he has never accepted responsibility. He is "neither delusional [n]or psychotic." Doc. 8-1 at 111.[1] Madison's own expert confirmed that he "is able to understand the nature of the pending proceeding," Doc. 8-3 at 19, understands that "the reason he was in prison was because of 'murder,'" understands that the State is "seeking retribution" for that crime, Doc. 8-3 at 18, and "understands the sentence . . . specifically the meaning of a death sentence," Doc. 8-3 at 18. Although some other dementia patient could be incompetent, the state court was well within reason to hold that Madison is not.

Like he did in 1990, Madison asserts that he cannot remember murdering Officer Julius Schulte. But Madison's ability to recall the killing has no bearing on the State's interest in punishing him for it. The community remembers Officer Schulte. His family remembers. The eyewitnesses who saw the murder—they remember. Although Madison may not recall committing this crime, the Eighth Amendment does not bar the State from punishing him for it.

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[1] Our citations to the record follow the format established in Madison's brief. *See* Pet. Br. at 5 n. 2.

STATEMENT

In April 1985, Vernon Madison killed Officer Julius Schulte during a domestic dispute. At the request of Madison's neighbors, Officer Schulte was protecting Madison's ex-girlfriend and her 11-year-old daughter while Madison moved out of their house. After pretending to leave, Madison retrieved a pistol, crept behind the car where Schulte was sitting, and fired two shots into the back of Schulte's head. *Madison v. State*, 620 So. 2d 62, 64 (Ala. Crim. App. 1992). After shooting Officer Schulte, Madison shot his ex-girlfriend in the back as she tried to run away. *Id.* Three eye witnesses—including the 11-year-old girl—watched as Madison murdered Officer Schulte and tried to murder his girlfriend. *Id.*

A. Trial and post-conviction proceedings.

Madison was charged with capital murder because he had murdered an on-duty police officer. *See* Ala. Code § 13A–5–40(a)(5). The government has "a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property." *Roberts v. Louisiana*, 431 U.S. 633, 636 (1977). Because of procedural errors, Madison was tried and convicted three times. *See Madison v. State*, 545 So.2d 94, 99 (Ala. Crim. App.1987); *Madison v. State*, 620 So.2d 62, 63 (Ala. Crim. App. 1992); *Madison v. State*, 718 So.2d 90 (Ala. Crim. App. 1997).

Although there has never been any doubt about Madison's guilt, he never accepted responsibility for murdering Officer Schulte. Instead, he has always concocted various theories to excuse his crime. For example, before his second trial in 1990, Madison was already telling psychologists that "he could not

remember the shooting." *Madison*, 620 So. 2d at 66. By the time of his third trial, he was claiming self-defense. *Madison*, 718 So. 2d at 97.

After each trial, Madison was sentenced to death because of his lifetime of violent crime.[2] Madison had previously been convicted of robbery, assault and battery with intent to kill, aggravated assault, and other violent offenses. *See* Sentencing Order at 4-5, *State v. Madison*, CC85-1385.80 (Mobile Cty. Cir. Ct. July 7, 1994). He was on parole from his most recent conviction when he murdered Officer Schulte. *Id.* at 5. After his third conviction and sentence were affirmed on direct review, Madison spent twenty years pursuing every conceivable avenue of state and federal post-conviction relief.

Madison's state post-conviction petition "languished in the [state] court for years with little action." *Madison v. State*, 999 So. 2d 561, 567 (Ala. Crim. App. 2006). "An evidentiary hearing was scheduled for February 23, 2000, but was continued on Madison's motion." *Id.* One year later, "[t]he circuit court issued an order notifying Madison that the [post-conviction] petition would be dismissed if counsel did not contact the court within 30 days." *Id.* Madison requested that a hearing be delayed for at least a year. *Id.* When that time came, he replaced his counsel. *Id.* Eventually, the trial court "concluded

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[2] Madison's first two juries recommended a death sentence. *See Madison*, 545 So. 2d at 95 (the jury's vote was 11-1); *Madison*, 620 So. 2d at 63 (10-2). The third death sentence was imposed by a judge after this Court had affirmed the constitutionality of judicial sentencing in capital cases. *See Harris v. Alabama*, 513 U.S. 504 (1995) . Madison waived any objection to the judge's sentencing authority. *See Madison*, 718 So. 2d at 104.

the long-delayed postconviction proceedings" by granting the State's motion to dismiss. *Id.*

Madison filed his first federal habeas petition in 2009. *Madison v. Allen*, 2011 WL 1004885, at *1 (S.D. Ala. Mar. 21, 2011). The federal habeas court held an evidentiary hearing on Madison's claim that the prosecutor exercised six of his eighteen strikes against black jurors because of their race. The court noted that Madison's final "jury was seven (7) blacks and seven (7) whites," even though the jury pool was 75% white. *Madison v. Allen*, 2013 WL 1776073, at *6 (S.D. Ala. Apr. 25, 2013). The prosecutor who tried Madison eventually became the "Chief of the criminal division for the U.S. Attorney's Office in the Southern District of Alabama." *Id.* Based on contemporaneous notes, he testified that he struck these six jurors for specific race-neutral reasons. *Id.* The federal habeas court denied the petition, and this Court denied certiorari. *See Madison v. Thomas*, 135 S. Ct. 1562 (2015).

B. The first state court competency petition

After the Attorney General asked the Supreme Court of Alabama to set an execution date, Madison filed a successive state-court post-conviction petition claiming he was incompetent to be executed. Doc. 8-1. The petition asserted that Madison was incompetent because he had suffered "both short-term and long-term memory loss." Doc. 8-1 at 2.

The state court set a hearing to evaluate Madison's claims of incompetence and gave Madison the opportunity to submit evidence, including from his own psychological expert. Doc. 8-1 at 55. Before the hearing, Madison was evaluated by Dr. Karl Kirkland, a court-appointed psychologist, and Dr. John

Goff, a neuropsychologist retained by Madison. At the hearing, the state court admitted Dr. Kirkland's report, Dr. Goff's report, and Madison's medical records. The state court also heard testimony from Dr. Kirkland, Dr. Goff, and the warden of the prison where Madison lived.

1. Dr. Kirkland's testimony. The state court appointed Dr. Kirkland to examine Madison's claims as a neutral expert on behalf of the court. Dr. Kirkland concluded that Madison has had physical and cognitive decline as a result of strokes. Doc. 8-1 at 74 (hearing). Even so, Dr. Kirkland concluded that Madison has a rational understanding that he is to be executed for killing a police officer in 1985. Doc. 8-1 at 78-79 (hearing); Doc. 8-3 at 9-10 (expert report). Dr. Kirkland determined that Madison has a "rational understanding of the sentence, [and] the results or effects of the sentence . . . ." Doc. 8-3 at 10 (report). Dr. Kirkland also found that Madison had normal thought content and showed no symptoms of psychosis, paranoia, or delusion. Doc. 8-3 at 8 (report).

Dr. Kirkland learned from Madison's treating physicians that Madison did not suffer from psychosis or delusions. Doc. 8-1 at 77 (hearing). They also reported that Madison was asked for, and able to give, consent for medical procedures. *Id.* at 76. Madison "refuses some of his medications because of side effects" but his treating physicians "felt that he knew what he was doing" in making that choice. *Id.* at 78.

At his evaluation, Madison gave Dr. Kirkland a detailed history of his life, his criminal record, and his conviction for murder. For instance, Madison said he was the son of Willie Seale and Aldonnia Madison, was "born in an old Mobile Hospital for African Americans that no longer exists," and that he is the

"oldest of 11 children, seven boys and four girls," four of whom have died. Doc. 8-3 at 3-4 (expert report). Madison said he was raised "on the end of Old Stanton Road in Mobile, where Stanton Street runs into Stanton Road." *Id.* at 4. Madison remembers his multiple juvenile arrests and the details of these crimes, including shooting a man in Mississippi, and the time he escaped from the Mt. Meigs Department of Youth Services Camp, hitching "rides all the way back home." *Id.* at 3. Madison remembered trying to join the Army during the Vietnam War because he "knew they would draft him one way or the other," and he remembers being "excluded from the Army by the physical due to be[ing] rated 4F." *Id.* at 4.

Madison also remembered details of his multiple trials, convictions, and appeals. Madison discussed each appeal and "marveled each time with the fact that the whole process would end up being back in Judge McCray's court." *Id.* at 8. Dr. Kirkland testified that "[Madison] was able to talk with me about very specific things that would indicate that he could remember specific things about the time of the offense even, as well as each trial." Doc. 8-1 at 123 (hearing).

Dr. Kirkland determined that although Madison had physical and mental limitations, Madison "clearly was able to discuss his case in a very accurate manner, including being able to accurately tell this examiner legal theories about why Judge McCray should have recused himself and why he refused to do so." Doc. 8-3 at 9 (expert report). When asked if Madison had a rational understanding of the reason for his execution, Kirkland replied, "Certainly. He talked specifically about death sentence versus life

without in the original trial and the first retrial and in the second." Doc. 8-1 at 124 (hearing).

2. Dr. Goff's testimony. Madison's expert, Dr. Goff, agreed with Dr. Kirkland that Madison experienced cognitive decline after suffering a stroke. He also diagnosed Madison with dementia or major neurological disorder. Even so, Dr. Goff concluded that Madison understands "the meaning of a death sentence." Doc 8-3 at 18 (expert report). Dr. Goff also concluded that Madison said his crime "must have been a murder," that he had three trials, and that he felt his "conviction was unjust." Doc. 8-3 at 18 (expert report). Dr. Goff concluded that Madison "is able to understand the nature of the pending proceeding and he has an understanding of what he was tried for." Doc. 8-3 at 19 (expert report). Similarly, Dr. Goff testified that Madison was not delusional or psychotic. Doc. 8-1 at 111 (testimony of Dr. Goff).

But, based on his interview with Madison, Dr. Goff opined that Madison had no independent recollection of the murder. According to Dr. Goff, Madison could not remember the name of the victim, and he did not think he killed anyone because he purportedly "never went around killing folks." Doc. 8-3 at 18 (report). Because Madison purportedly could not remember the murder, Dr. Goff concluded that Madison did not understand the rationale of the current proceeding as it applied to him. Doc. 8-3 at 19-20. Dr. Goff remarked, "I think he understands that he's being executed, but I don't think that he understands why, because I don't think he has those--those memories." Doc. 8-1 at 110 (hearing). Similarly, Dr. Goff concluded that "I think he understands that [the State is] seeking retribution" but "I don't think he understands the act that he's being -- that he's being

punished for." *Id.* at 120. When Dr. Goff formed that conclusion, he was unaware that Madison had always denied responsibility for the murder. *Id.* at 120.

Dr. Goff gave three reasons for believing that Madison cannot remember killing Officer Schulte. First, Dr. Goff concluded that Madison had experienced a thalamic stroke. Doc. 8-3 at 19 (expert report). Second, Dr. Goff relied on Madison's statements that he does not recall the murder and that he "never went around killing folks." *Id.* at 18 (report); Doc. 8-1 at 115-16 (hearing). Third, Dr. Goff relied on his evaluation of Madison, including a test he administered showing Madison's trouble completing basic tasks and remembering basic information and Madison's tendency to speak in a rambling vague manner, which suggested to Dr. Goff that Madison "can't remember what it is that he's told me." Doc. 8-3 at 18 (expert report); Doc. 8-1 at 114 (hearing).

3. The Warden's testimony. The warden testified that when Madison received the death warrant setting his execution date, Madison expressed no confusion or lack of understanding of what it meant, commenting, "[M]y lawyers are supposed to be handling that." Doc. 8-1 at 130 (hearing). The warden also testified that Madison was not receiving treatment for a mental condition in prison. Doc. 8-1 at 131 (hearing).

4. The state court's first decision. The state court issued a detailed order, finding Madison competent to be executed. Doc. 8-2 at 149. The state court expressly found that Madison is not delusional. Doc. 8-2 at 158. The state court also found that "Madison has a rational[] understanding, as required by *Panetti*, that he is going to be executed because of the murder he committed and a rational[] understanding

that the State is seeking retribution and that he will die when he is executed. . . . ." Doc. 8-2 at 158.

Alabama law provides no right to appeal this determination in the state court system. *See* Ala. Code § 15-16-23. This is presumably because of the expedited nature of last-minute litigation about executions and because the Supreme Court of Alabama is the body that sets an execution date in the first place.

C. The court of appeals grants habeas corpus, and this Court summarily reverses.

Madison filed a habeas petition in federal court, raising the same claims he raised in the state court proceeding. *See* Doc. 1. Under the Anti-Terrorism and Effective Death Penalty Act, a habeas petitioner cannot obtain relief without showing that a state court's adjudication is "contrary to, or an unreasonable application of, clearly established law," or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The district court denied Madison's application after concluding that "[i]t is apparent that the state court adjudication of these claims applied the relevant *Panetti/Ford* standard for determining competency to be executed, considered all of Madison's factual averments, and found that any dementia, and the alleged deficits in memory associated with that condition, did not prevent Madison from having a rational understanding of his execution and the reasons for his execution." *Madison v. Dunn*, 2016 WL 2732193, at *9 (S.D. Ala. May 10, 2016).

The court of appeals reversed the district court and granted Madison's petition for writ of habeas

corpus. *Madison v. Comm'r, Alabama Dep't of Corr.*, 851 F.3d 1173 (11th Cir. 2017). That court explained that the "mental conditions relevant here" are "dementia and related memory loss," not psychosis or delusions. The court adopted a bright-line rule that "a man with no memory of what he did wrong" cannot be "put to death." *Id.* at 1188. The court held that a person cannot be executed if he "doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone." *Id.* at 1189.

This Court summarily reversed the court of appeals. *See Dunn v. Madison*, 138 S. Ct. 9 (2017). The Court held that "the state court did not unreasonably apply *Panetti* and *Ford* when it determined that Madison is competent to be executed because—notwithstanding his memory loss—he recognizes that he will be put to death as punishment for the murder he was found to have committed." *Id.* at 12. The Court recognized that "[t]estimony from each of the psychologists who examined Madison supported the court's finding that Madison understands both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime." *Id.* The Court explained that "[n]either *Panetti* nor *Ford* 'clearly established' that a prisoner is incompetent to be executed because of a failure to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case." *Id.* at 11-12.

Justice Ginsburg concurred. She noted that "[t]he issue whether a State may administer the death penalty to a person whose disability leaves him without memory of his commission of a capital offense is

a substantial question not yet addressed by the Court." *Id.* at 12 (Ginsburg, J., concurring).

D. Madison's second state court competency petition.

After the State again set Madison's execution date, Madison filed a second petition challenging his competency to be executed. It was filed under the same case number and assigned to the same judge as his first petition. Madison's petition relied on the "previously established evidence of Mr. Madison's significant mental impairments" and asserted unspecified "continued decline." The petition also asserted that the court should discard its neutral expert's previous testimony because he was accused of self-prescribing medications.

The State responded with three main arguments. First, the State asserted collateral estoppel and res judicata, noting that Madison was merely seeking to relitigate decided issues. Second, the State noted that Madison had alleged no new evidence to warrant relitigating his competency—such as a new diagnosis or new expert opinion. Third, the State explained that the neutral expert's legal problems were irrelevant because they had nothing to do with his methodology or conclusions and his testimony matched the testimony of Madison's own expert.

The court held oral argument limited to whether the court should vary from its previous order denying Madison's competency petition. The judge recalled from the prior hearing that there was "nothing in [Dr. Kirkland's] demeanor, his testimony, his approach to how he evaluated the case to be []significantly different from Dr. Goff's" and "[t]hey pretty much came down the same except for a very few

matters." Hr'g R. at 29:6-12. After the hearing, the court orally denied Madison's petition from the bench. Hr'g R. at 32:23-25; 33:1. The court later entered a written order denying Madison's second petition because it "did not provide a substantial threshold showing of insanity . . . sufficient to convince this Court to stay the execution." Cert. Pet. App. A.

SUMMARY OF ARGUMENT

The Eighth Amendment does not prohibit the State from executing a convicted murderer because he cannot independently recall committing a crime. The death penalty is justified by the State's interests in retribution and deterrence, and those interests are not diminished when a convicted murderer cannot remember committing his crime.

I. The lower court correctly applied this Court's Eighth Amendment precedents to deny Madison's competency claim.

A. Although the Eighth Amendment prohibits the State from executing someone who is insane and lacks a rational understanding of the reasons for his execution, the lower court correctly held that Madison does not meet that standard. Madison's mental disorder does not render him incompetent. Although his dementia purportedly precludes him from remembering his capital offense, it does not preclude him from understanding that he is being punished for murdering Officer Schulte or from sharing the community's understanding of crime, punishment, retribution, and death.

Under this Court's precedents, a State may execute a prisoner whose mental disability leaves him

without memory of his commission of the capital offense. A failure to recall committing a crime is distinct from a failure to understand why one is being punished for a crime. An inmate's personal recollection of the crime is irrelevant to whether the inmate shares the community's understanding of the crime, has a moral responsibility for committing the crime, or understands why he is being punished for the crime.

B. Madison incorrectly argues that the lower court misapplied this Court's precedents. Although Madison suggests that the mere diagnosis of dementia means that he is incompetent to be executed, this Court has made clear that a prisoner's mental condition does not establish incompetence unless that mental condition precludes the inmate from understanding why he is being executed.

Nothing about dementia necessarily precludes a rational understanding of crime and punishment. Cognitive disorders like dementia exist on a spectrum of cognitive and functional impairment and are accompanied by a wide variety of symptoms. Although another prisoner may be rendered incompetent by dementia, the lower court appropriately held that Madison has not been.

II. No part of this Court's Eighth Amendment doctrine suggests that the Constitution eliminates the sovereign power of the State to punish a convicted murderer who cannot remember committing a capital offense.

A. The common law supports the punishment of criminals who do not remember committing a crime. The common law prohibition on executing the insane narrowly applied to prisoners who lacked the

capacity to reason or understand. Common law courts have held that amnesia does not constitute insanity.

Moreover, the rationales offered by common law authorities do not preclude punishing a murderer who lacks an independent recollection of his crime. The loss of memory does not undermine a prisoner's ability to appreciate the religious and moral significance of his crime. Nor does it affect his ability to participate in court proceedings after his guilt has been established.

B. There are no objective indicia that society has determined that it is inhumane to execute an inmate who cannot recall his crime. Despite several recent highly-publicized amnesia claims by death row inmates, no state has enacted legislation to preclude the execution of an inmate who cannot recall committing a crime. Standards promulgated by professional associations likewise suggest that an inmate's recollection is irrelevant to his competency to be executed.

C. Lastly, the State has two penological interests in punishing a murderer who cannot remember committing a crime: retribution and deterrence.

Retribution is concerned with whether a person is culpable for an offense that warrants punishment. The Court has recognized that the murder of a police officer is a grievous offense that warrants the harshest punishment. And, unlike the young or intellectually disabled, Madison is fully culpable for murdering Officer Schulte. Madison's mental condition does not preclude him from understanding that he is being punished for murdering a police officer or that such a murder is a grave moral wrong.

Deterrence also justifies the execution of an inmate, regardless whether he can recall his crime. Madison's execution will serve as an example to others that the intentional murder of a police officer will be punished. And an inmate suffering from amnesia is no less subject to deterrence than an inmate who remembers the crime that put him in prison.

III. Madison's proposed rule would increase the potential for false claims and manipulation.

First, Madison's argument would preclude the execution of any inmate with dementia, giving that diagnosis an unwarranted importance. The diagnosis of cognitive disorders is not straightforward, and the difference between a minor disorder and a major disorder is essentially arbitrary.

Second, Madison's rule would allow many more inmates to assert incompetence claims. Many medical conditions can arguably result in the loss of memory. And few convicted capital murderers are willing to concede the facts of their crime or their moral responsibility for it.

Third, a prisoner's assertion that he cannot remember his crime is not objectively verifiable. Although there are ways to test cognitive decline and memory loss, the only person who can know for sure whether an inmate remembers his crime is the inmate himself.

The Eighth Amendment forbids the execution of a murderer who has lost his sanity, not his memory. This Court should affirm.

ARGUMENT

I. The lower court's decision is consistent with *Ford* and *Panetti*.

The Constitution affirms the sovereign power of the States to execute the worst murderers as a deterrent to themselves and others and as retribution for the community's loss. *See Gregg v. Georgia*, 428 U.S. 153, 176 (1976). This Court has recognized that the imposition of the "death penalty undoubtedly is a significant deterrent" to "many" murders and that retribution "is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." *Id.* at 183, 185 (joint opinion of Stewart, Powell, and Stevens, JJ.).

Nowhere are these state interests more apparent than where, as here, the State's own agent was the victim of premeditated murder. *See Roberts v. Louisiana*, 431 U.S. 633, 636 (1977). "Policemen are both symbols and outriders of our ordered society, and they literally risk their lives in an effort to preserve it." *Id.* at 647 (Rehnquist, J., dissenting). For that reason, the State has an especially strong interest "in making unmistakably clear that those who are convicted of deliberately killing police officers acting in the line of duty" know that punishment "will be inexorable." *Id.* (Rehnquist, J., dissenting).

In light of these principles, Madison must carry an especially heavy burden to justify an exception to the constitutionality of capital punishment for his unique circumstances. He cannot do so. When he murdered Officer Schulte, Madison was not part of a class with any characteristic tending to make him less culpable or less subject to deterrence. He was

not, for example, intellectually disabled or a juvenile. Instead, he was a thrice-convicted violent felon on parole. Today, Madison is older. But he knows that he is being punished for a crime he committed, and he shares the community's understanding of that crime and the punishment. It is neither cruel nor unusual for the State to carry out his sentence.

A. Madison can rationally understand his punishment.

The lower court correctly determined that Madison's allegations in his second petition did not establish that he was incompetent to be executed. Madison's second petition in the state court merely reasserted the allegations in his first petition, with the addition of unrelated charges against the court's appointed expert. Because of these identical allegations, there was no reason for the lower court to vary from its prior fact-finding that "Madison has a rational[] understanding, as required by *Panetti*, that he is going to be executed because of the murder he committed and a rational[] understanding that the State is seeking retribution and that he will die when he is executed. . . . ." Doc. 8-2 at 158.

This fact-finding is neither clearly erroneous nor a misapplication of this Court's case law. The Eighth Amendment prohibits a state "from inflicting the penalty of death upon a prisoner who is insane," *Ford v. Wainwright*, 477 U.S. 399, 410 (1986), including one who "suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced," *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007). The upshot is that an inmate

may "establish[] incompetency by . . . a showing that his mental illness obstructs a rational understanding of the State's reason for his execution." *Id.* at 956.

But an inmate cannot meet his burden under *Ford* and *Panetti* merely by showing that he has been diagnosed with a mental disorder. Instead, the inmate must show that his diagnosed mental disorder actually prevents him from a factual or rational understanding of the reasons for his execution. *Panetti*, 551 U.S. at 959. *See also Ford*, 477 U.S. at 422 (Powell, J., concurring). The prisoner's "awareness of the crime and punishment" must have "little or no relation to the understanding of those concepts shared by the community as a whole." *Panetti*, 551 U.S. at 959. Accordingly, the inquiry is whether the diagnosed mental disorder "render[s] a subject's perception of reality so distorted that he should be deemed incompetent." *Id.* at 962.

The lower court correctly applied this Court's precedents to the facts of Madison's case. It is undisputed that Madison has suffered cognitive decline over the years. But it is also undisputed that Madison has not experienced delusions, psychosis, or confusion about the meaning of crime, punishment, or death. Moreover, as this Court has already explained, "[t]estimony from each of the psychologists who examined Madison supported the court's finding that Madison understands both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime." *Dunn*, 138 S. Ct. at 12. Despite Madison's cognitive decline, Madison's own expert, Dr. Goff, "found that Madison 'is able to understand the nature of the pending proceeding and he has an

understanding of what he was tried for'; that he knows he is 'in prison ... because of murder; that he 'understands that ... [Alabama is] seeking retribution' for that crime, and that he 'understands the sentence, specifically the meaning of a death sentence.'" *Id.* at 10-11. Even Madison's responsibility-denying statements that he never "went around killing folks" and that his sentence is "unjust" proves that he understands the crime he committed and the retributive nature of his sentence. Doc. 8-3 at 18 (expert report).

Madison's dementia purportedly means that he does not remember—and will not acknowledge—murdering Officer Schulte. *See* Pet. Br. at 9 ("memory loss"), 10 ("retrograde amnesia"), 11 ("memory impairments"), 25 ("cannot independently recall the facts of the offense"). But the Court has already recognized that an inmate's "failure to remember his commission of the crime" is "distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case." *Dunn*, 138 S. Ct. at 12. A history major may have no independent memory of the Vietnam War, but still understand the conflict; a Vietnam veteran may remember the war in vivid detail, but have delusional beliefs about it. "[E]veryone is amnesic to some degree" because "every individual's memory process is marked by some distortion." *Note, Amnesia: A Case Study in the Limits of Particular Justice*, 71 Yale L. J. 109, 109-111 (1961). But such memory problems do not stop us from having a rational understanding of our past. They do not make us less culpable or deserving of punishment. They do not render our punishment any less of a deterrent to ourselves or others.

Panetti itself compels the common-sense conclusion that an inmate's "failure to remember his commission of the crime" is "distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case." *Dunn*, 138 S. Ct. at 12. In *Panetti*, the Court made clear that the rational understanding it required was an "awareness of the crime and punishment" like that "shared by the community as a whole." *Panetti*, 551 U.S. at 958-59. But no one in the broader community (except, perhaps, an eyewitness) will understand an inmate's execution based on his or her own independent recollection of the facts of a murder. Rather, the community's understanding will be based on the facts as adduced in the trial, press reports, or other third party accounts. Independent recollection of a crime has nothing to do with the community's understanding of the punishment.

This self-evident distinction between memory and rational understanding is why the lower courts are unanimous in their opinion that a murderer's inability to remember his crime does not render him incompetent to be executed.[3] The only lower court

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[3] *See Bedford v. Bobby*, 645 F.3d 372, 374-76, 378 (6th Cir. 2011) (although inmate's "condition ha[d] ... deteriorated ... with the onset of . . . dementia," his "memory [wa]s severely impaired," and he "lack[ed] intact memories of events and easily confuse[d] memories he does have or that others attempt to remind him about," court held that these conditions "do not establish that [he] does not understand the reasons for his conviction or the nature of his punishment."); *Simon v. Fisher*, 641 F. App'x 386, 389 (5th Cir. 2016) (agreed with Sixth Circuit); *State ex rel. Clayton v. Griffith*, 457 S.W.3d 735, 750 (Mo. 2015) (although inmate has "several disorders," including "dementia," "traumatic brain injury," "a small stroke," and "possible age-related decline," he has a rational understanding under *Ford/Panetti* because he "understands that he is under the threat of execution, that this will result in his death"); *State v.*

that has held dementia-induced memory problems to bar execution is the one this Court summarily reversed in the last iteration of this case. *See Dunn*, 138 S. Ct. at 12.

Ultimately, Madison's legal position extends the prohibition on executing the insane far beyond *Ford* and *Panetti*. Madison may not independently remember his crime. But he shares the community's understanding of crime and punishment, can appreciate the morality of murder, and knows he is being executed because he was convicted of that crime. He understands these concepts so well that he continues to deny responsibility for murdering Officer Schulte and to assert that his sentence is "unjust." Doc 8-3 at 18 (Goff expert report). Madison's dementia-induced amnesia is insufficient to establish incompetence to be executed.

B. Madison's arguments for reversal are unpersuasive.

Madison's brief does not explain how his inability to recall his crime makes his understanding of "crime and punishment" any different than the understanding "shared by the community as a whole." *Panetti*, 959. Instead, the brief makes two unpersuasive arguments that do not meaningfully grapple with the actual question presented.

First, Madison argues against a strawman, suggesting that the lower court denied his successive cut-and-paste petition because dementia is not a

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Irick, 320 S.W.3d 284, 295-96 (Tenn. 2010) (although inmate "has no memory of the events surrounding the murder," inmate was competent to be executed because he understood "that he has been convicted of murdering the victim" that that he was "scheduled to be executed for this crime").

mental disorder. In the fantasy world imagined by Madison's brief, the lower court "rejected Mr. Madison's claim for relief under *Ford* largely because dementia and neurological disease were seen as outside the scope of protection under the Eighth Amendment." Pet. Br. at 16. The lower court also supposedly denied Madison's claim because "vascular dementia constitutes a different medical condition than what this Court has recognized as triggering the Eighth Amendment protections of *Ford* and *Panetti*." Pet. Br. at 24.

But in the real world, the lower court found—and the State argued below—that Madison has a rational understanding of the death penalty *despite* his dementia and purported memory problems.[4] As we told the Court the last time we were here, the problem for Madison's legal position is that he can rationally understand why he is being punished, "not that [he] suffers from a delusion that is different than the one at issue in *Panetti* or that his 'DSM diagnosis differ[s]' from the diagnosis in *Ford*." State's Reply Br.,

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[4] In a footnote, Madison's brief asserts that "the State has consistently argued that Mr. Madison's claim should fail because vascular dementia, and associated cognitive and memory impairments, is not considered a mental illness." Pet. Br. 24 n. 16. This is incorrect. As a matter of *state* law, the State has argued that Madison's condition is not "insanity" under Ala. Code § 15-16-23, such that his petition should have been filed under Rule 32 of the Alabama Rules of Criminal Procedure. But, as a matter of federal law, the State has consistently argued that Madison does not meet the *Ford/Panetti* standard because his mental disorder does not prevent him from understanding why he is being punished. *See, e.g.*, State Br. in Opp'n 14 (noting that Madison's "own expert agreed that he understands he was tried for [murder], that he is in prison and will be executed because of that offense, and the finality of death if his sentence is carried out").

Madison v. Dunn, No. 17–193. at 7 (Sept. 14, 2017). In the words of the federal habeas court, the state court "found that any dementia, and the alleged deficits in memory associated with that condition, did not prevent Madison from having a rational understanding of his execution and the reasons for his execution." *Madison v. Dunn*, 2016 WL 2732193, at *9 (S.D. Ala. May 10, 2016). As we have explained above, *supra* pp. 18-22, the lower court's decision on this point faithfully applied this Court's precedents.

Second, Madison's brief simply begs the question by assuming without any argument that he meets the *Ford/Panetti* standard. This error starts at the very beginning of his brief. Madison's certiorari petition asked the Court to determine whether the State could execute a "prisoner whose mental disability leaves him without memory." Cert. Pet. at i. This is the question we have answered. But Madison's brief alters the question presented so that it also asks whether the State may execute a prisoner whose mental condition "leaves him without memory of the commission of the capital offense *and prevents him from having a rational understanding of the circumstances of his scheduled execution*." Pet. Br. at i (emphasis added). This formulation builds the assumption that Madison meets the *Ford/Panetti* standard (and thus cannot be executed) into the question presented, even though the Court granted certiorari to resolve the question whether his impairments meet that standard and even though the lower court held as a matter of fact that he did not.

Madison's question-begging argument assumes that the bare fact that he suffers from dementia necessarily establishes that he is incompetent to be executed. But this argument finds no support in *Ford*

or *Panetti*. In both cases, the Court made clear that an inmate could not establish incompetence merely by having a mental disorder. The central question in both cases was whether an inmate's diagnosed mental disorder actually eliminated his ability to understand his punishment.[5] Under *Ford* and *Panetti*, it is not enough for Madison to suffer from a diagnosed mental disorder. He must establish that his "mental illness obstructs a rational understanding of the State's reason for his execution." *Panetti*, 551 U.S. at 956.

The rational understanding step in the competency analysis is especially important with a diagnosis like dementia. The DSM-5 recognizes that cognitive disorders like dementia "exist on a spectrum of cognitive and functional impairment" that varies considerably from person to person. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 607 (5th Ed. 2013) [hereinafter "DSM-5"]. Because the key diagnostic criteria is "cognitive decline from a previous level of performance," a "high-functioning individual" may be properly diagnosed with dementia even if his abilities register as "'normal.'" DSM-5 at 602, 607. Moreover, a major neurocognitive disorder like dementia may be accompanied by a wide variety of symptoms. One person who suffers from dementia

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[5] The district court on remand in *Panetti* expressly found the inmate to be "mentally ill," but, like the state court in this case, still found that the innate had "a factual and rational understanding of his crime, his impending death, and the causal retributive connection between the two." *See Panetti v. Quarterman*, 2008 WL 2338498, at *37 (W.D. Tex. Mar. 26, 2008). The court of appeals affirmed, and this Court denied certiorari. *See Panetti v. Stephens*, 727 F.3d 398 (5th Cir. 2013), *cert. denied*, 135 S. Ct. 47 (2014).

might merely "require[e] assistance with . . . paying bills." DSM-5 at 602. Another might have "delusions" and "paranoia." DSM-5 at 606. As the Court has observed, the medical definitions of mental disorders "are subject to flux and disagreement," and diagnoses "may mask vigorous debate within the profession about the very contours of the mental disease itself." *Clark v. Arizona*, 548 U.S. 735, 752, 772 (2006). "[T]he consequence of this professional ferment," the Court has noted, "is a general caution in treating psychological classifications as predicates for excusing otherwise criminal conduct." *Id.* at 775

Although it is possible that some other inmate with dementia could establish that his condition has eliminated his rational understanding of crime and punishment, Madison has not met that burden. Even though Madison was already asserting 28 years ago that he could not remember the murder, he now says a recently diagnosed disorder has caused him not to recall "the facts of the offense" or "the name of the victim." Pet. Br. at 10. But Madison's lack of independent recollection does not eliminate his ability to understand death, appreciate the gravity of murdering a police officer, or otherwise share the community's understanding of crime and punishment. Madison's own expert testified that he "is able to understand the nature of the pending proceeding," Doc. 8-3 at 19 (report), understands that "the reason he was in prison was because of 'murder,'" understands that the State is "seeking retribution" for that crime, Doc. 8-1 at 120 (hearing), and "understands the sentence . . . specifically the meaning of a death sentence," Doc. 8-3 at 18 (report). Madison's disorder does not make him any less deserving of punishment nor does it render his

punishment less of a deterrent to himself or to others.

II. The Eighth Amendment allows a State to punish a murderer whose mental disability leaves him without memory of his commission of the capital offense.

Just as Madison's claims are inconsistent with *Ford* and *Panetti*, no other part of this Court's Eighth Amendment doctrine supports his position.

In determining whether the Eighth Amendment bars a particular punishment as "cruel and unusual," the Court has followed a well-established analytical path. First, the Court examines whether the punishment was among "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" in 1791. *Ford*, 477 U.S., at 405; *see also Solem v. Helm*, 463 U.S. 277, 285-86 (1983). Second, the Court considers whether the punishment is deemed cruel and unusual according to modern "standards of decency." *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality op.)). Those standards derive principally from "objective evidence of contemporary values," the "clearest and most reliable" of which is "the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citation and quotation marks omitted). Finally, the Court applies its "independent judgment" to evaluate "the acceptability of a particular punishment under the Eighth Amendment." *Roper*, 543 U.S., at 563-64. In capital cases, the Court has made this assessment primarily by reference to "the penological justifications for the

death penalty." *See id.*, at 571; *Atkins*, 536 U.S., at 317.

A. The common law supports the punishment of murderers who cannot remember committing a crime.

The constitutional prohibition on executing the insane comes from the common law. *See Ford*, 477 U.S. at 406-07 (citing Blackstone and Coker). But there is no similar common law prohibition on the punishment of someone who cannot recall committing a crime.

The historical sources uniformly attest that the common law prohibition on the execution of the insane came into play only if a prisoner suffered a comprehensive deprivation of his intellectual powers. Blackstone formulates the prohibition on the execution of the insane in terms of the concept of "nonsane memory." As he puts it, if a man "in his sound memory commits a capital offence" and later "becomes of nonsane memory, execution shall be stayed." 4 William Blackstone, *Commentaries*, *24-*25. But in the Law French of Blackstone's time, the expression "nonsane memory" did not denote amnesia. It was defined as a condition in which a party "was Mad or not within his wits." John Cowell, A Law Dictionary or The Interpreter of Words and Terms (1777)(definition of "non sane memory"). *See also* Alexander M. Burrill, A Law Dictionary and Glossary 192 (2d ed. 1859)(definition of "memory"). Indeed, Edward Coke's discussion of the same prohibition requires that the inmate be "totally deprived of all compassings, and imaginations." 3 Edward Coke, Institutes 6 (6th ed. 1680). Matthew Hale also stressed that the requisite mental condition "must be

an absolute madness." 1 Matthew Hale, Pleas of the Crown 37 (1736). And Blackstone's own discussion uses the term "nonsane memory" interchangeably with "madness." 4 Blackstone, *Commentaries*, *24-*25.

It is thus entirely unsurprising that common law courts confronted with the question whether this prohibition extends to amnesia have answered with a resounding "no." *Contra* APA Br. at 11. Parliament codified the common law prohibition in the Criminal Lunatics Act of 1800 shortly after our country ratified the Eighth Amendment. *See* Richard Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield*, 19 Law & Society Rev. 487, 513-15 (1985). By the middle of the 20th century both English and Scottish courts had firmly concluded that "amnesia causing the disappearance of all memory of the events surrounding the alleged crime cannot of itself constitute insanity for the purposes of that Act." *R.* v. *Podola*, [1959] 43 Crim. App. 220, 238 (England) (recognizing that term "memory" as used in Blackstone "does not relate to recollection, but to a state of mind"). *See also Russell v. H.M. Advocate*, 1946 S.C.(J.) 37 (Scotland) (same).

Thus, the common law itself supplies no support for Madison's position. Nor do the rationales for the prohibition on the execution of the insane offered by common law authorities, and Madison makes little attempt to argue otherwise.

First, Justice Powell observed in *Ford* that some authorities contended that it is "against christian charity to send a great offender quick ... into another world, when he is not of a capacity to fit himself for it." 477 U.S. at 419-20 (Powell, J., concurring) (quoting Hawles, Remarks on the Trial of Mr. Charles

Bateman, 11 How. St. Tr. 474, 477 (1685)). Drawing on this rationale, Madison suggests that his execution would "implicate society's and the Eighth Amendment's aversion to grotesque and obscene punishment." Pet. Br. at 28. But there is no sense in which Madison's alleged memory loss could implicate the "natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity." *Ford*, 477 U.S. at 409. Madison's amnesia does not affect his capacity to know that he murdered Officer Schulte or to understand that murdering a police officer is morally wrong. This is enough for Madison to reckon with the gravity of his crime and seek reconciliation based on whatever religious or moral beliefs he may hold.

Second, *Ford* indicates that some common law authorities took the justification for the prohibition to be that a prisoner who has lost his sanity cannot adequately participate in his defense and thus may forfeit an opportunity to obtain a stay of execution that he otherwise might have realized. 477 U.S. at 406-407. But as Justice Powell's concurrence rightly noted, this "justification[] has slight merit today" because "[m]odern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review." *Id.* at 420 (Powell, J., concurring in part and concurring in the judgment). Factual issues are contested primarily at the trial court level where the defendant's opportunity to participate and advise defense counsel is protected by the requirement of trial competency. And appeals that occur late in the process leading to execution tend to address legal rather than factual issues, emphasizing the competency of appellate counsel rather than that of the condemned.

Third, *Ford* notes that another common law rationale for the prohibition on the execution of the insane was that "madness is its own punishment: *furiosus solo furore punitur*." 477 U.S. at 407-08. *But see* Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 La. L. Rev. 995, 1002 (1991) ("[M]adness cannot constitute punishment comparable to execution simply because it is not punishment at all."). Madison makes no attempt to rely on this rationale, and with good reason, because it is difficult to see how this rationale makes any sense as applied to Madison's condition. Dementia is a common disorder that afflicts roughly 3.9 million Americans, including roughly 7% of all Americans over 60 years old. *See* Martin Prince, Tenata Bryce, et al, *The Global Prevalence of Dementia: A Systematic Review and Metaanalysis*, 9 Alzheimer's & Dementia 63, 69 (2013). Madison's dementia-based amnesia is not equivalent to state-imposed punishment for murder.

Fourth, *Ford* mentions one other traditional justification for the prohibition: that the execution of a prisoner who has lost his mind is simply "savage and inhuman." 477 U.S. at 406 (quoting Blackstone); *see also* 3 Edward Coke, Institutes 6 (6th ed. 1680). This "intuition that such an execution simply offends humanity" may supply a satisfactory explanation of the common law rule, but it does nothing to support the extension of that doctrine to cases of amnesia. *Ford*, 477 U.S. at 409. As *Ford* itself suggests, this intuition's legal significance derives from the fact that it "is evidently shared across this Nation." *Id.* at 409. Nothing similar can be said about the execution of prisoners who cannot recall the facts of their crime. *See infra* pp. 32-34 (discussing present standards of

decency). Moreover, the factual predicate undergirding this intuition is absent in cases like Madison's. The traditional common law prohibition "protect[s] the condemned from fear and pain without comfort of understanding" and thus avoids the brutal spectacle of the execution of a person with no comprehension of his predicament. *Ford*, 477 U.S. at 410. But Madison's condition does not deprive him of the relevant mode of understanding, and thus presents no such risk.

B. Madison's position finds no support in state legislation or sentencing practice.

The Court's Eighth Amendment analysis also relies on "objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S at 173. Indeed, Eighth Amendment cases "should be informed by objective factors *to the maximum possible extent*." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (emphasis added). *See also Ford*, 477 U.S. at 406 (pointing to the "objective evidence of contemporary values" as the touchstone of any "standards of decency" analysis).

There is not a shred of legislative evidence that Madison's execution would flout contemporary "standards of decency." In the death penalty context, the "clearest and most reliable objective evidence of contemporary values" are the laws passed by the people's elected representatives. *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). But not one State has proscribed the use of capital punishment against prisoners with dementia-induced memory loss. This legislative silence is all the more striking given the recent, highly-publicized claims of death-row inmates with medical conditions

like Madison's in Ohio,[6] Missouri,[7] and Mississippi.[8] Were the public widely opposed to execution in such cases, one would expect a swift legislative response—a groundswell like the ones that preceded *Atkins* and *Roper*. *See Atkins*, 536 U.S. at 313-18; *Roper*, 543 U.S. at 564-67. But no such response has materialized.

For their part, the relevant professional associations have adopted standards that focus on psychosis, not memory. The American Bar Association does not address "memory" in its standard for competence to be executed. That standard instead provides that a "convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceeding, what he or she was tried for, the reason for the punishment or the nature of the punishment." Am. Bar Assoc. Crim. Just. Mental Health Stds., Std. 7-5.6(b).[9] Like the ABA, the American Psychiatric Association and the American Psychological Association are concerned about inmates with "profound de-

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[6] *Ohio Man Executed for Double Murder He Doesn't Remember*, Daily Mail (May 17, 2011) http://www.dailymail.co.uk/news/article-1388091/Ohio-man-Daniel-Lee-Bedford-executed-double-murder-doesnt-remember.html (last visited June 29, 2018).

[7] *Missouri Executes Cecil Clayton, Killer who had Brain Injury*, LA Times (March 17, 2015) http://www.latimes.com/nation/nationnow/la-na-nn-missouri-execution-cecil-clayton20150317-story.html (last visited June 29, 2018).

[8] *Is Mississippi Death Row Inmate Robert Simon Faking Amnesia?*, AL.com (The Associated Press) (June 10, 2015); https://www.al.com/news/index.ssf/2015/06/is_mississippi_death_row_inmat.html (last visited June 29, 2018).

[9] http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html (last visited July 26, 2018).

ficiencies in understanding" that are "associated with mental retardation and with delusional beliefs." *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 676 (2006). These organizations believe an inmate is competent to be executed if he has "a meaningful understanding that the state is taking his life in order to hold him accountable for taking the life of one or more people." *Id.*

We recognize that twelve years ago these organizations adopted a policy resolution that *any* significant mental disorder should bar the imposition of the death penalty. *See id.*; Pet. Br. at 27 n.17. That extreme position explains the amicus brief two of these organizations filed here. *See* APA Br. at 2. But no state legislature has adopted this position. Nor has it persuaded any lower court.[10] Because there is no basis in the evolving standards of decency to hold that any mental illness precludes execution, neither Madison nor his amici expressly argue for such a rule.

C. The State has valid penological interests in punishing a murderer who cannot remember committing a crime.

Finally, a prisoner's ability to recall his crime is irrelevant to whether his execution would advance the penological interests the Court has singled out as

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[10] *See In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006); ; *Baird v. Davis*, 388 F.3d 1110, 1114–15 (7th Cir. 2004); *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010); *Mays v. State*, 318 S.W.3d 368, 379–80 (Tex. Crim. App. 2010); *Johnston v. State*, 27 So.3d 11, 26–27 (Fla. 2010); *Hall v. Brannan*, 670 S.E.2d 87, 96–97 (Ga. 2008); *State v. Ketterer*, 855 N.E.2d 48, 77 (Ohio 2006); *State v. Johnson*, 207 S.W.3d 24, 50–51 (Mo. 2006); *Matheney v. State*, 833 N.E.2d 454, 458 (Ind. 2005); *Malone v. State*, 293 P.3d 198, 216 (Okla. Crim. App. 2013).

"the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008). The retributive value of punishment depends on an offender's culpability *at the time of the offense*, not at the time when his sentence will be executed. There is likewise no reason to believe that Madison's execution will not have the same deterrent effect as any other execution.

1. Retribution. From a retributive perspective, amnesia developed after the commission of a capital offense has no bearing on whether the offender deserves to be executed for his crime. Retributive justice requires the punishment of offenders because they have engaged in culpable wrongdoing and thus deserve to be punished. *See Atkins*, 536 U.S. at 319; *Tison v. Arizona*, 481 U.S. 137, 149 (1987); Michael S. Moore, *Justifying Retributivism*, 27 Isr. L. Rev. 15, 30 (1993). The object of retributive justice is the cancellation of a wrong committed against an individual and the State through the elimination "of the moral imbalance caused by the offense." *Graham v. Florida*, 560 U.S. 48, 71 (2010). This imbalance arises when an offender engages in culpable wrongdoing and cannot be corrected until he receives the punishment he deserves.

Put otherwise, retributive justice is backward-looking and concerned only with the offender's culpability at the time when he committed the offense in question. *See* Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 Cornell L. Rev. 989, 1029 (1996). "From a retributive perspective, the punishment a defendant deserves is . . . fully congealed at the time of the crime. The future is neither here nor there. Only the past mat-

ters." *Id.* at 1029-1030. Only the offender's state of mind at the time when he committed the offense in question is relevant to retribution.

To be sure, *Panetti* suggests that retribution has a communicative function that is compromised when a prisoner's "mental illness obstructs a rational understanding of the State's reason for his execution," even if he were fully culpable for his offense. 551 U.S. at 956. As this Court put the point, "it might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed." *Id.* at 958. When "the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole," however, "[t]he potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question." *Id.* at 958-59.

But these concerns are not implicated here. A prisoner's failure to independently recall committing a crime does not prevent him from possessing an understanding of his crime and sentence that corresponds to the conception of the community as a whole. The facts of this case provide an apt illustration. Apart from the three eye witnesses who saw Madison murder Officer Schulte, no member of the community's grasp of the gravity of Madison's crime and the justification for his sentence will derive from introspectively-accessible memories of the murder.

Instead, their understanding will be based on the evidence adduced at Madison's murder trials—the same evidence that led three juries to convict him of capital murder. That Madison allegedly cannot recall murdering Officer Schulte in no way undercuts his capacity to form the same understanding of his crime and sentence based on the same evidence.

For analogous reasons, the fact that Madison's vascular dementia allegedly prevents him from remembering that he murdered Officer Schulte does nothing to obstruct his potential "recognition of the severity of the offense." *Id.* at 958. Nothing in the record so much as suggests that Madison has lost the capacity to recognize that murdering a police officer is a grave legal and moral offense. *See Roberts*, 431 U.S. at 649 (Rehnquist, J., dissenting) ("the premeditated murder of a peace officer is so heinous and intolerable a crime that no combination of mitigating factors can overcome"). And any reasonably mature human being can feel guilt and remorse for a wrong they have committed against another person even if they cannot personally recall committing the act in question. Thus, to the extent the political community's decision to impose a capital sentence communicates "its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed," Madison can receive and understand this message. *Panetti*, 551 U.S. at 958.

Finally, Madison's argument finds no purchase in precedents that "ban[] the execution of prisoners whose diminished culpability, by virtue of age or intellectual disability, rendered the death penalty excessive and cruel." Pet. Br. at 18. Unlike the young or the intellectually disabled, Madison does not have "lesser culpability" for his crimes. *Atkins*, 536 U.S. at

319.[11] Madison was a violent felon on parole when he murdered Officer Schulte and tried to murder his estranged girlfriend. He is fully culpable for his actions.

2. Deterrence. Deterrence also justifies the execution of a capital sentence even where the prisoner has purportedly forgotten committing his crime. "The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." *Atkins*, 536 U.S. at 320. The general deterrent effect of capital punishment is diminished for offenders who suffer from "the same cognitive and behavioral impairments that make . . . defendants less morally culpable." *Id.* Impairments of this kind "also make it less likely that they can process the information of the possibility of execution as a penalty, and as a result, control their conduct based upon that information." *Id.*

But this logic applies only to cognitive impairments that have taken hold before an offender has committed a capital crime. Just as the subsequent development of a memory impairment has no impact on an offender's moral culpability at the time when he committed his offense, it can have no effect on an offender's ability to incorporate the expected cost of a capital sentence into the "cold

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[11] Madison argues that "age of onset is the only difference between an individual who is intellectually disabled . . . and an individual who suffers from dementia." Pet. Br. 28 at 17. Though Mr. Madison's cognitive faculties have slipped in the wake of his recent strokes, he has an IQ of 72—above the cognitive threshold required to stand trial, to be held criminally responsible for one's actions, or to be eligible for execution under *Atkins*. *See* Pet. Br. at 26.

calculus that precedes the decision" to commit a capital crime. *Gregg v. Georgia*, 428 U.S. 153, 186 (1976). Unlike the intellectually disabled or juveniles, offenders like Madison do not form a class of persons who are "less likely to consider potential punishment" when deciding whether to commit a capital offense. *Miller v. Alabama*, 567 U.S. 460, 472 (2012).

If anything, extending the doctrine of *Ford* and *Panetti* to Madison's amnesia claim would diminish the general deterrent value of capital punishment by interposing between conviction and execution a requirement that a prisoner independently remember committing their crime. This would make it less likely that any given offender will be executed for his crime, since there is a nontrivial chance that anyone can develop a memory-impairing health condition. Madison's proposed rule would also effectively condition the execution of a death sentence on the offender's assent to the proposition that he remembers committing his crime. This development would undermine the threat of punishment upon which general deterrence depends.

Madison's attempts to demonstrate that his condition would compromise the deterrent value of his sentence come up short.

First, he argues that because the *Ford* plurality suggested that the execution of an incompetent person "provides no example to others and thus contributes nothing to whatever deterrence value is intended by capital punishment," 477 U.S. at 407, his execution would not serve the ends of deterrence. Pet. Br. at 28. But this argument begs the question by assuming—with no further argument—that Madison's condition renders him incompetent to be executed. As argued above, *supra* pp. 18-27,

Madison's amnesia in no way prevents him from forming the requisite "rational understanding of the reasons for the execution." *Panetti*, 551 U.S. at 958. Thus, *Ford* supplies no cause for skepticism about whether Madison's execution would provide an example to others. And common sense suggests that it will. His execution will send a message that murdering a police officer is a crime grave enough to warrant "the law's most severe penalty." *Roper*, 543 U.S. at 571. *See also Roberts*, 431 U.S. at 636 & n.3.

Second, Madison asserts—with no apparent justification—that "with incapacity by virtue of dementia, specific deterrence is already achieved." Pet. Br. at 28. But this assertion is contradicted by a wealth of evidence suggesting that, in all but the most severe cases, persons who suffer from dementia can respond rationally to incentives.[12] While it is true that a mentally ill prisoner who has no awareness that he will be executed if he commits a capital offense is not specifically deterrable, this logic plainly does not extend to those who, like Madison, do not suffer from that impairment.

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[12] *See, e.g.*, Soumya Hegde & Ratnavalli Ellajosyula, *Capacity Issues and Decision-Making in Dementia*, 19 Ann. Indian Acad. Neurol. 34 (2016) (summarizing research on reasoning and capacity in dementia patients); J. Karlawish, *Measuring Decision-Making Capacity in Cognitively Impaired Individuals*, 16 Neurosignals 91 (2008) (decisional impairment is on a spectrum in dementia patients); Scott Y.H. Kim, Jason H.T. Karlawish, & Eric D. Caine, *Current State of Research on Decision-Making Competence of Cognitively Impaired Elderly Persons*, 10 Am. J. Geriatric Psychiatry 151 (2002) (noting that many dementia patients do not suffer from decisional impairment).

III. Madison's proposed extension of *Ford* and *Panetti* will lead to false claims, manipulation, and abuse.

Madison's proposal to extend *Ford* and *Panetti* will heighten the already existing problem of false claims, manipulation, and abuse in this area. Justice O'Connor warned in *Ford* that "the potential for false claims and deliberate delay in this context is obviously enormous." 477 U.S. at 429 (O'Connor, J., concurring in part and dissenting in part). Because every death row inmate has an incentive to delay his execution, she predicted that an inmate will continue to "claim that he has become insane" no matter "the number of prior adjudications of the issue, until the very moment of execution." *Id.* Madison's position, if accepted, would only make these problems worse.

First, Madison's position would give talismanic importance to an inmate's mental disorder diagnosis, even though precise mental health diagnoses are shifting, debatable, and subjective. "[P]sychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). For that reason, "a particularly acute need for guarding against error inheres in a determination that 'in the present state of the mental sciences is at best a hazardous guess however conscientious.'" *Ford*, 477 U.S. at 412 (quoting *Solesbee v. Balkcom*, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting)). As Justice Powell explained,

> Unlike issues of historical fact, the question of petitioner's sanity calls for a basically subjective judgment. And unlike a determination of

> whether the death penalty is appropriate in a particular case, the competency determination depends substantially on expert analysis in a discipline fraught with 'subtleties and nuances.'

Ford, 477 U.S. at 425 at 426 (Powell, J., concurring in the judgment) (quoting *Addington v. Texas*, 441 U.S. 418, 430 (1979)) (citations omitted).

The diagnosis of cognitive disorders, in particular, is not nearly as straightforward as Madison claims. The DSM-5 classifies vascular dementia as a "major neurocognitive disorder" characterized by progressive memory loss, general cognitive decline, and diminished executive functioning. DSM-5 at 621. While earlier editions of the DSM relied exclusively on clinical observation to establish these four factors, the DSM-5 incorporates neurological imaging—primarily MRIs and CT scans—as a way to confirm a patient's cognitive decline. Specifically, it directs physicians to find abnormalities in these brain scans, and to correlate them to clinically-observable cognitive deficiencies. *See id.* at 622 ("Etiological certainty requires the demonstration of abnormalities on neuroimaging."). But, despite these changes in the DSM-5, dementia remains a necessarily vague diagnosis. The DSM-5 recognizes that the "distinction between major and mild" neurocognitive disorders "is inherently arbitrary" without any "[p]recise thresholds." *Id.* at 608. Stripped to its essentials, dementia refers to abnormal cognitive decline, corroborated by brain imaging, for which no superior explanation is available. "Vascular dementia is s syndrome, not a disease." Kenneth Rockwood et al., *Diagnosis of Vascular Dementia*, 21 Can. J. Neurol. Sci. 358, 361 (1994). .*See*

also APA Br. at 8. The use of brain imaging does not render a dementia diagnosis any less subjective.

Second, under Madison's rule, many more prisoners will be able to claim that their mental disorders prohibit their execution. Because few people who commit capital murder are "normal" or "rational" in the conventional sense, the Court has rightly imposed a high bar for an inmate to "show[] that his current mental state would bar his execution." *Panetti*, 551 U.S. at 934, 959. Lowering that bar as Madison suggests would leave a blurry line between the small class of capital murderers who are "insane" and the very many who are "unrepentant" and "lack all sense of guilt." *Id.* at 960.

There are also many neurological conditions that could deprive a capital murderer of an independent memory of committing his crime. The range of prisoners eligible to assert such claims would not be confined to those suffering from stroke-induced dementia like Madison. Recognized medical conditions that can result in the loss of autobiographical memory include traumatic brain injuries,[13] Alzheimer's disease,[14] Parkinson's

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[13] Pascale Piolino, Béatrice Desgranges, Liliane Manning, Pierre North, Corinne Jokic, & Francis Eustache, *Autobiographical Memory, the Sense of Recollection and Executive Functions After Severe Traumatic Brain Injury*, 43 Medical Image Analysis 172 (2007) (traumatic brain injury patients, compared with healthy controls, were significantly impaired in recalling episodic autobiographical memories).

[14] Mohamad El Haj et al., *Autobiographical Memory Decline in Alzheimer's Disease*, 27 Ageing Res. Rev. 15 (2016) (autobiographical recall in Alzheimer's disease is characterized by loss of episodic information).

disease,[15] and Wernicke-Korsakoff syndrome.[16] Apart from these disorders, the generic effects of aging, stress, and depression can also induce episodic memory loss.[17] There is even evidence suggesting that otherwise healthy, high-functioning individuals can suffer from severe autobiographical memory deficiencies even when they do not suffer from any medical disorder recognized under existing diagnostic criteria.[18]

These concerns are not speculative or marginal. Over the past few decades, as this Court has expanded the range of state and federal appeals

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[15] Sarah J. Smith, Celine Souchay, Martin A. Conway, *Overgeneral Autobiographical Memory in Parkinson's Disease*, 46 Cortex 787 (2010).

[16] Michael D. Kopelman, *What Does A Comparison of The Alcoholic Korsakoff Syndrome And Thalamic Infarction Tell Us About Thalamic Amnesia?*, 54 Neuroscience & Behavioral Rev. 46 (2015).

[17] *See, e.g.*, Brian Levine, Eva Svoboda, Jannine F. Hay, Gordon Winocur, & Morris Moscovitch, *Aging and Autobiographical Memory: Dissociating Episodic from Semantic Retrieval*, 17 Psychology and Aging 677 (2002) (older adults manifested diminished personal remote memory); Mark A. Smith, *Hippocampal Vulnerability to Stress and Aging: Possible Role of Neurotrophic Factors*, 78 Behavioral Brain Research 25 (1996) (anxiety and stress can result in hippocampal damage and loss of memory); B.M. Elzinga & J.D. Bremner, *Are the Neural Substrates of Memory the Final Common Pathway in Posttraumatic Stress Disorder?*, 70 J. Affective Disorders 1 (2002) (by influencing the hippocampus, amygdala, and prefrontal cortex, posttraumatic stress disorder can result in autobiographical memory disturbances); Cristiano A. Köhler et al., *Autobiographical Memory Disturbances in Depression*, 2015 Neural Plast. 759139 (2015) (major depressive disorder is characterized by dysfunctional processing of autobiographical memory).

[18] Daniela J. Palombo, Claude Alain, Hedvig Söderlund, Wayne Khuu, & Brian Levine, *Severely Deficient Autobiographical Memory (SDAM) in Healthy Adults: A New Mnemonic Syndrome*, 72 Neuropsychologia 105 (2015).

afforded to prisoners facing capital punishment, the average age of death row inmates has been steadily rising. At the same time, dementia is expected to become increasingly common in advanced societies: by 2030, demographers predict, 11.25% of North Americans over 60 will have dementia. This figure is expected to reach 17.32% by 2050. *See* Martin Prince, Tenata Bryce, et al, *The Global Prevalence of Dementia: A Systematic Review and Metaanalysis*, 9 Alzheimer's & Dementia 63, 70 tbl.4 (2013). Given these two trends, we can expect to see a sharp increase in the number of death row inmates invoking real or feigned age-related health problems to evade execution.

Third, a rule prohibiting the execution of those who cannot remember committing their crime would create new opportunities for malingering and evasion. "False pleas of amnesia by criminal defendants are both common and difficult to detect." *Price v. Thurmer*, 637 F.3d 831, 834 (7th Cir. 2011) (citing Marko Jelicic, Harald Merckelbach & Saskia van Bergen, *Symptom Validity Testing of Feigned Amnesia for a Mock Crime*, 19 Archives of Clinical Neuropsychology 525 (2004)). Although there are tests for detecting false claims of amnesia, "'there is still ... no "gold standard" measure for distinguishing between cases of genuine and feigned amnesia.'" *Id.* (quoting Xue Sun et al., *Does Feigning Amnesia Impair Subsequent Recall?*, 37 Memory & Cognition 81 (2009)).

Although Madison points to the possibility of neuroimaging to verify false claims of amnesia, neuroimaging cannot establish the precise extent of a patient's cognitive decline or memory loss. Technological advances in brain imaging have made detection of the physiological correlates of dementia-

induced memory loss easier to recognize by objective means. But verifying that a prisoner's condition has resulted in the loss of the specific memories associated with the commission of a capital offense will ultimately turn on the prisoner's say-so. The existing scientific consensus is that functional magnetic resonance imaging "research, processes, and technology are insufficiently developed and understood for gatekeepers to even consider introducing these neuroimaging measures into criminal courts as they stand today for the purpose of determining the veracity of statements made." Elena Rusconi & Timothy Mitchener-Nissen, *Prospects of Functional Magnetic Resonance Imaging as Lie Detector*, 7 Frontiers in Human Neuroscience, Art. 594 at 1 (2013). Ultimately, the only person who can know with any certainty whether a person remembers a particular event is the person himself.

CONCLUSION

The Court should hold the line it established in *Ford*, *Panetti*, and its 2017 decision in this case. Sanity and recollection are two distinct concepts. Although the Constitution bars the execution of an inmate who has lost his sanity, it does not bar the execution of an inmate who has lost his memory. The Court should affirm.

Respectfully submitted,

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No. 17-7505

In The
Supreme Court of the United States

VERNON MADISON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari To The Mobile County Circuit Court

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

Experts agree that Vernon Madison now sits on Alabama's death row unable to fully orient to time and place. Brain trauma as a result of multiple strokes has led to decreasing cognitive capabilities and reduced his intellectual functioning to the borderline range. It is undisputed that he suffers from varying degrees of disorientation and confusion about the world around him. He frequently urinates on himself and complains that no one will let him out to use the bathroom when there is a toilet inches away from his bed. His memory is so impaired that he can no longer recite the alphabet or do a simple math problem. He is unable to remember that his mother and brother are deceased and cannot identify the prison warden or officers who have been guarding him for years. Multiple strokes and brain injuries have left Mr. Madison nearly blind and he can no longer read or write; he often has difficulty speaking and his tangential and repetitive speech makes him difficult to understand. By every available measure, Mr. Madison's diagnosed dementia has compromised his cognitive functioning and rendered him unable to rationally understand his current circumstances and pending execution.

In the lower courts, Respondent argued that *Ford* relief was only available to prisoners who suffered from "delusions" or "psychosis" as a result of a mental illness, and that because Mr. Madison's claim was based on a diagnosis of dementia, he "failed to implicate *Ford v. Wainwright*, 477 U.S. 399 (1986), or *Panetti* [*v. Quarterman*, 551 U.S. 930 (2007),] in this

proceeding." (Doc. 8-2 at 140-41); *see also Madison v. Comm'r, Ala. Dep't of Corr.*, 851 F.3d 1173, 1188 (11th Cir. 2017) ("Rather, the State suggests that only a prisoner suffering from gross delusions can show incompetency under *Panetti*."). Respondent now appears to concede that dementia can be the basis for relief under *Ford* although that is not what the State argued to either the state or federal courts. Respondent's concession is significant because there is no dispute that Mr. Madison suffers from severe vascular dementia with acute features that leaves him unable to rationally understand the circumstances of his pending execution and the reasons for his confinement.

Vernon Madison suffers from a permanent and irreversible neurological condition. Without substantially addressing the facts of Mr. Madison's vascular dementia, Respondent nevertheless argues that protecting Mr. Madison from a cruel execution will circumscribe the State's sovereign power to "impose a just and constitutional punishment on a violent criminal who murdered one of the State's own law enforcement officers." Resp't Br. 1. But neither the facts surrounding Mr. Madison's conviction and sentence of death for the shooting death of Officer Julius Schulte nor the propriety of a death sentence when the victim is a law enforcement officer is at issue in this case.[1]

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[1] It is worth reemphasizing that in this case, the community – as represented by a jury of "seven (7) blacks and seven (7) whites," Resp't Br. 5 (citing *Madison v. Allen*, No. 09-00009-KD-B, 2013 WL 1776073, at *2 (S.D. Ala. Apr. 25, 2013)) – rejected the death penalty as the appropriate punishment and instead

The question of whether the Eighth Amendment prohibits the execution of the incompetent has already been resolved by this Court in *Ford v. Wainwright*, 477 U.S. 399, 410 (1986), and reaffirmed in *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007). In those cases, the Court recognized that the Eighth Amendment places a substantive limit on a State's ability to execute a category of individuals defined by their mental disability. *See id.* ("[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." (quoting *Ford*, 477 U.S. at 409-10)). The Court's Eighth Amendment jurisprudence thus already embodies the way a just society treats people who are severely disabled by their mental status. This determination, however, is completely unrelated to the identity or status of the victim, the heinousness of the crime, or the propriety of the original sentence.

Moreover, the Eighth Amendment prohibition on the execution of incompetent prisoners does not negate the State's ability to punish but rather enforces the community's understanding of human dignity in the context of punishment. Nothing about the State's decision to charge, convict and severely punish criminal offenders, even seek the death penalty for those

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sentenced Mr. Madison to life without the possibility of parole. Judge McRae, the trial judge, rejected this life sentence, and, as he has done on five other occasions with five other life-sentenced defendants, *see* Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override* 16 (2011), http://eji.org/sites/default/files/death-penalty-in-alabama-judge-override.pdf, he sentenced Mr. Madison to death. *Madison v. State*, 718 So. 2d 90, 94 (Ala. Crim. App. 1997).

convicted of killing a law enforcement officer, is implicated by this case. Rather, the question for the Court in this case is whether Mr. Madison, who suffers from the severe physical and cognitive deficits that reflect the progressive decline endemic to vascular dementia, should be shielded from an extreme punishment in the same way that our legal system shields such vulnerable individuals in other contexts. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 734-35 (1997) (State of Washington's ban on assisted suicide reasonably ensures against risk of abuse of "vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia").

For the reasons identified in Mr. Madison's principal brief as well as those stated below, this Court should reverse the lower court judgment.

ARGUMENT

I. Vernon Madison Suffers from a Verifiable and Confirmed Case of Vascular Dementia, and the Resulting Cognitive and Physical Disabilities Render Him Unable to Understand or Appreciate the Circumstances of His Pending Execution.

Vernon Madison suffers from a verifiable and confirmed case of vascular dementia. In its brief, Respondent essentially ignores the import of this diagnosis and instead focuses primarily on the assertion that a prisoner's inability to recall events in one's life,

including the circumstances surrounding the crime for which he is to be executed, is insufficient to establish incompetency under the dictates of *Ford* and *Panetti*. *See, e.g.*, Resp't Br. 2, 13, 15-16, 20-21. Supporting amici similarly focus almost exclusively on memory, arguing that the ability to recall details of the crime is not generally required for culpability purposes, Texas et al. Amicus Br. 5-7, and is even "less relevant in the execution context," *id.* at 8. But Mr. Madison is not challenging his culpability or even arguing that, standing alone, a simple memory deficit would necessarily place him under the protection of *Panetti*. Rather, it is the verifiable and uncontested diagnosis of vascular dementia, and the attendant and inevitable progressive decline that characterizes this permanent neurological disorder, that disables Mr. Madison.

As detailed in Mr. Madison's opening brief and the record aptly demonstrates, in this case, vascular dementia has manifested such that, as measured by every identifiable metric – physical, intellectual, and psychological – Mr. Madison's connection with the outside world has been severed so as to prevent him from understanding or appreciating the circumstances of his current execution, thus placing him in the category of prisoners for whom execution would constitute a "uniquely cruel penalty." *Ford*, 477 U.S. at 421 (Powell, J., concurring).

In addition to being legally blind, Mr. Madison's incontinence, inability to walk unassisted, and dysarthric or slurred speech are all symptoms characteristic of late-stage vascular dementia. Am. Psychological Ass'n

& Am. Psychiatric Ass'n Amicus Br. 9-10 [hereinafter "APA Br."]. He suffers from additional, chronic medical conditions – small vessel ischemia, occipital angioma – that continue to exacerbate his physical and cognitive decline. *See* Pet. Br. 8.

Likewise, Mr. Madison's intellectual deficits are apparent and undisputed, based largely on Dr. Goff's evaluation and neuropsychological testing: he now functions in the borderline range of intelligence with an IQ score of 72 and suffers from severe memory deficits, most clearly demonstrated in a Working Memory Score of 58, placing him "within the borderline to intellectually disabled range." (Doc. 8-3 at 17, 20 (expert report of Dr. Goff); Doc. 8-1 at 97-98 (4/14/16 hearing).) While important markers of the extent to which the cerebral trauma he has experienced have negatively impacted his cognitive abilities, these scores do not adequately capture the specific ways in which this disease has devastated Mr. Madison's abilities to make connections in his day-to-day interactions.

At a minimum, these deficits impair Mr. Madison's ability to interact with the world around him and he routinely exhibits profound confusion and disorientation. Drs. Goff and Kirkland noted that he was only *partially* oriented to time and place (Doc. 8-1 at 74-75 (hearing); Doc. 8-3 at 8 (expert report of Dr. Kirkland)), noting that he did not know the season, date or day of the week (Doc. 8-3 at 8 (Kirkland report); *see also* Doc. 8-3 at 16 (Goff report) (not oriented to day of month)). He had "some difficulty understanding" the reasons for Dr. Goff's evaluation (Doc. 8-3 at 15 (Goff report)), and

became confused when he reached the letter "G" while attempting to recite the alphabet (Doc. 8-3 at 16 (Goff report); *see also* Doc. 8-1 at 100 (hearing)). He is "unable to rephrase simple sentences" or "perform simple mathematical calculations" (Doc. 8-3 at 18 (Goff report)), could not "recall any out of 25 elements from a brief story vignette," and his "[l]ogical memory for verbal material was very poor" (Doc. 8-3 at 16 (Goff report)). When he was unable to recall the details or recount an incident he "confabulated some things," meaning that he "made stuff up to fill the gaps, which people with memory problems, that's what they do." (Doc. 8-1 at 100 (hearing).)

This profound disorientation and confusion manifest in other ways as well: struggling to retain basic information, repeatedly asking the same question, even when it had been answered, and increasingly focusing on a limited number of familiar topics. (Doc. 8-1 at 22, ¶ 13 (Affidavit of Ashley Edwards); Doc. 8-1 at 25, ¶ 8 (Affidavit of Jennae Swiergula).) He seemed unable to recognize his attorney over the phone or in person (Doc. 8-1 at 25, ¶ 6 (Swiergula affidavit)), and "could not remember his attorneys' names" during Dr. Goff's evaluation (Doc. 8-3 at 18 (Goff report)). He has also exhibited signs of confusion while communicating with his attorney, at one point asking a question about an in-person meeting he believed occurred the previous day, when in fact, his attorney had not seen him for several months. (Doc. 8-1 at 25, ¶ 7 (Swiergula affidavit).) During a legal visit in February 2016, he indicated confusion about the status of his case, stating

that he plans to move to Florida or live abroad after he is released from prison. *Madison*, 851 F.3d at 1179; (*see also* Doc. 8-1 at 24-25, ¶¶ 4, 9 (Swiergula affidavit)).

He "could not recall people and events that he had previously identified as being extremely significant to him." (Doc. 8-1 at 24, ¶ 5 (Swiergula affidavit).) He was unable to "retrieve his [father's] name" when speaking with Dr. Goff. (Doc. 8-3 at 15 (Goff report).) Notably, after returning from the hospital after his stroke, he repeatedly asked that his mother be notified, and had to repeatedly be told that he could not see her because she had passed away several years earlier. (Doc. 8-1 at 24, ¶ 5 (Swiergula affidavit); *see also* Doc. 8-1 at 101 (hearing); Doc. 8-3 at 19 (Goff report).) Similarly, he asked to see his brother, who had also died previously. (Doc. 8-1 at 101 (hearing); Doc. 8-3 at 19 (Goff report).)

This disorientation extends to confusion about his surroundings and hygiene-related tasks. *See* APA Br. 9. Mr. Madison reported frequently urinating on himself because "no one will let me out to use the bathroom," despite the fact that he has a toilet in his cell. *Madison*, 851 F.3d at 1179; (Doc. 8-1 at 22, ¶ 12 (Edwards affidavit)). Additionally, Mr. Madison has presented as increasingly and uncharacteristically disheveled, wearing a visibly soiled uniform, covered in stains and hair shavings, and on his bare feet, wearing plastic shower sandals that did not match. (Doc. 8-1 at 21-22, ¶ 11 (Edwards affidavit).) In subsequent visits, his hygiene continued to deteriorate. (Doc. 8-1 at 25, ¶ 10 (Swiergula affidavit).)

Mr. Madison's diagnosed vascular dementia, and the physical and cognitive deficits referenced here and in Mr. Madison's opening brief make clear that Respondent's attempt to pigeon hole this case as one that is only about Mr. Madison's "inability to recall his crime" or "amnesia" simply fails to account for the undisputed evidence in this case. *See, e.g.*, Resp't Br. 22, 30. By every available metric, Mr. Madison has and will continue to experience profound and progressive deterioration in his cognitive and physical functioning that fundamentally alters his ability to understand and connect the events in his life. *See* APA Br. 10 ("These deficits interfere with Mr. Madison's ability to form a rational understanding of his punishment and its relationship to his crime of conviction.").

II. The Inclusion of Individuals Suffering from Vascular Dementia in the Class of People for Whom Execution Would Constitute a Cruel and Unusual Punishment Does Not Alter the Analysis Established in *Ford* and *Panetti* or Otherwise Expand the Category of Individuals for Whom Execution Is Inappropriate.

Mr. Madison has consistently maintained that he is not competent to be executed because as a result of multiple, severe strokes, he suffers from vascular dementia and the corresponding physical and cognitive deficits that have impaired his ability to recall numerous events in his life, including the sequence of events from the offense, to his arrest, to his trial. Because he

can no longer understand or connect the underlying offense to his pending execution, he does not have the "rational understanding" required by *Ford* and *Panetti*, and his execution is therefore barred by the Eighth Amendment.

Despite this consistent claim, Respondent insists that Mr. Madison intends to "extend[ ] the doctrine of *Ford* and *Panetti*" to ban the execution of prisoners with "amnesia," Resp't Br. 39, and then spends considerable space and effort arguing that this "extension" is not supported by this Court's Eighth Amendment doctrine, Resp't Br. 41, and would result in "new opportunities for malingering and evasion," Resp't Br. 45, and an increase in "false claims, manipulation, and abuse," Resp't Br. 41.[2] But Respondent's arguments are both inaccurate and misleading.

Mr. Madison is not, in fact, arguing that this Court should shield him from execution based solely on a claim of simple amnesia, as Respondent suggests. Rather, Mr. Madison is asking this Court to recognize that a prisoner may be deemed incompetent under the analysis outlined in *Ford* and *Panetti* where, as here, the undisputed evidence establishes that Mr. Madison has been diagnosed with vascular dementia, a serious neurocognitive disorder, and that the cognitive and physical deficits associated with that disorder have

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[2] Likewise, Texas and states joining with Respondent argue that Mr. Madison seeks a "categorical rule." Texas et al. Amicus Br. 2 ("[D]ementia and other mental illnesses are too variable for a categorical rule like *Atkins*.").

rendered him unable to rationally understand his current circumstances.

As articulated in both Mr. Madison's opening brief and the supporting amicus brief of the APA, medical and scientific advancements have allowed for increased confidence in the diagnosis of mental disorders, such as dementia, that merit protection under the Eighth Amendment. These advancements include not only neuroimaging and brain-mapping techniques, *see* Pet. Br. 31-33, but "well-established procedures" including structured clinical interviews, consultation of collateral sources of information and treatment records, and cognitive tests, *see* APA Br. 14-16. Vascular dementia, in particular, has "several unifying characteristics, which allow for consistent diagnoses," APA Br. 7-8, made in reliance on history, physical examination and neuroimaging, Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 621-22 (5th ed. 2013) [hereinafter "DSM-5"].

In addition to the specific criteria necessary for a diagnosis of dementia or major neurocognitive disorder, *see* DSM-5 at 602, the etiological subtype of vascular dementia requires that the "onset of cognitive deficits [be] temporally related to one or more cerebrovascular events" or be "prominent in complex attention . . . and frontal-executive function," and that "[t]here is evidence of the presence of cerebrovascular disease from history," to include neuroimaging evidence of "large vessel infarcts or hemorrhages," a "strategically placed single infarct," "two or more lacunar infarcts outside the brain stem," or "extensive and

confluent white matter lesions." DSM-5 at 621-22. As such, dementia is verifiable in ways that other mental illnesses are not.

Not only are mental-health professionals adept at using both traditional tools and brain imaging to diagnose dementia, but in using these tools to identify persons who are malingering or otherwise feigning impairment.[3] APA Br. 16-17.

The only question in this case has been, and continues to be, whether dementia and its attendant cognitive deficits and memory impairments can render a prisoner incompetent under the rubric developed in *Ford* and *Panetti*.[4] Because the record undisputedly establishes that Mr. Madison is severely compromised by a verifiable neurological disease of vascular dementia, as well as brain injury, cognitive decline, memory loss and a diminished capacity to rationally understand

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[3] In this case, the experts agreed that Mr. Madison was not malingering his dementia and associated cognitive deficits. (Doc. 8-3 at 17 (Goff report); Doc. 8-3 at 9 (Kirkland report).)

[4] Up to this point, Respondent has answered a resounding "no" to that question, and the state trial court followed suit when it made no mention of Mr. Madison's diagnosed dementia anywhere in its 2016 order denying Mr. Madison's competency claim. (Doc 8-2 at 149-58.) While Respondent now claims to have previously argued that dementia could form the basis of an incompetency claim, Resp't Br. 23 n.4, the record contradicts Respondent on this point. *See Madison*, 851 F.3d at 1188 n.15 ("At oral argument, the State argued that a prisoner who has severe dementia that doesn't result in delusions but has completely obliterated his memory would be competent to be executed because the mere fact that a prisoner doesn't suffer from delusions means that he can form the rational understanding required by *Panetti*.").

what he is experiencing, the answer to that question must be yes.

III. A Finding that Mr. Madison Is Incompetent Does Not Implicate the State's Ability to Punish but Rather Enforces the Community's Understanding of Human Dignity in the Context of Punishment.

There is no question the Eighth Amendment ban on cruel and unusual punishments provides boundaries within which states must operate. *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding Eighth Amendment ban on "cruel and unusual punishment" extends to states). "While the State has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards." *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

In *Ford*, this Court recognized that the civilized standards embodied in the Eighth Amendment prohibited the execution of prisoners found to be incompetent. 477 U.S. at 409-10. In so holding, this Court did not find any fault with the general propriety of the death penalty or how it was imposed, but rather affirmed a principle embraced by all the states that executing an incompetent person served no useful penological purpose and diminished society's view of its own pursuit of justice. *Id.* at 406-09; *see also id.* at 419 (Powell, J., concurring).

Respondent and supporting amici nevertheless devote a significant portion of their briefing to arguments about the propriety of the death penalty in cases in which a law enforcement officer is killed and more specifically about Mr. Madison's culpability in this case.[5] *See, e.g.*, Resp't Br. 17 ("The Constitution affirms the sovereign power of the States to execute the worst murderers" and "the State has an especially strong interest" in executing those convicted of killing police officers), 38 ("He is fully culpable for his actions."); Texas et al. Amicus Br. 12 ("Because petitioner did not have dementia when he murdered a police officer and attempted to murder his ex-girlfriend, his culpability for those crimes is in no way diminished by his current state."). But the question before the Court – whether the Eighth Amendment prohibits the execution of a mentally disabled prisoner with severe cognitive deficits and neurological impairments as a result of vascular dementia – has nothing to do with culpability and does not negate the State's ability to punish. Mr. Madison has not and will not go unpunished. He has now been held in solitary confinement on death row for 33 years facing the constant threat of execution. He exists in a small cell where dementia has left him disoriented, confused, blind, incontinent, and unable to walk

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[5] The National Association of Police Organizations argues that enhanced penalties for those convicted of killing police officers are constitutional. *See, e.g.*, Nat'l Ass'n Police Orgs. Amicus Br. 12. Mr. Madison has never argued otherwise, and it is telling that nowhere in the organization's brief will this Court find a citation to *Ford* or *Panetti* and nowhere will it find the words "competence," "incompetent," or like.

while he questions the circumstances of his confinement and pending execution and asks to see relatives that have long been dead. Rather, this case has everything to do with how we treat individuals who have been rendered incapacitated by a mental disorder, development or disability.

The Court's holding in *Ford*, and later in *Panetti*, makes clear that the prohibition on executing an incompetent person does not turn on the nature of the offense for which the death sentence has been imposed. In *Ford*, for example, this Court never even elucidated the facts of the offense for which Mr. Ford was convicted. In fact, a jury found that "on July 21, 1974, Alvin Bernard Ford murdered a helpless, wounded police officer by shooting him in the back of the head at close range." *Ford v. Wainwright*, 752 F.2d 526, 526 (11th Cir. 1985) (per curiam), *rev'd*, 477 U.S. 399 (1986). Scott Panetti was convicted of killing his mother-in-law and father-in-law in front of his wife and daughter. 551 U.S. at 935-36. At no point did this Court question whether these facts were determinative of whether the Eighth Amendment permitted their execution despite evidence suggesting each was incompetent. *See also Stewart v. Martinez-Villareal*, 523 U.S. 637, 639 (1998) (noting without elaboration that petitioner was convicted of two counts of first-degree murder in holding his *Ford* claim was not a "second or successive petition" for AEDPA purposes).

Similarly, this Court's Eighth Amendment holdings in *Roper* and *Atkins* barring certain defendants from being sentenced to death contain no exemption

dependent upon the circumstances of the crime. *See Roper v. Simmons*, 543 U.S. 551, 572 (2005) (finding bar on execution of children while noting "we cannot deny or overlook the brutal crimes too many juvenile offenders have committed"); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (noting death penalty already confined to "a narrow category of the most serious crimes"). Likewise, despite Respondent's insistence to the contrary, *Ford*'s and *Panetti*'s prohibition on executing the mentally incompetent provides no exemption for an incompetent person to be executed if the State deems the prisoner to be the "worst murderer[ ]" or the case to be one in which the State "has an especially strong interest." Resp't Br. 17.

In addition, a finding that Mr. Madison's vascular dementia and severe cognitive and memory deficits render him incompetent to be executed will not curtail the states' powers to seek and impose death in any other case in which it is already able to do so. *Ford* did not end the death penalty, did not limit the crimes for which death can be imposed, and did not erect any bar on those who could be sentenced to death. Indeed, *Ford* still permits the execution of someone found incompetent so long as that person regains competence. *See* 477 U.S. at 425 n.5 (Powell, J., concurring) ("[I]f petitioner is cured of his disease, the State is free to execute him."); *see also Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003) (en banc) ("A State does not violate the Eighth Amendment as interpreted by *Ford* when it executes a prisoner who became incompetent during his long stay on death row but who subsequently

regained competency through appropriate medical care."). Here, finding Mr. Madison incompetent based on his significant mental disabilities does not "interpos[e]" any additional step between conviction and execution, as the State alleges, Resp't Br. 39, because *Ford* and *Panetti* already establish that the Eighth Amendment requires, or "interposes" a requirement of, competence.

Mr. Madison has a verifiable neuropsychological disorder – vascular dementia as a result of several strokes – that impedes his ability to rationally understand what the State proposes to do to him and why it proposes to do it. This Court should affirm *Ford* and *Panetti* and find that Mr. Madison's execution is prohibited. 551 U.S. at 934 ("'[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.' The prohibition applies despite a prisoner's earlier competency to be held responsible for committing a crime and to be tried for it." (quoting *Ford*, 477 U.S. at 409-10)).

CONCLUSION

The judgment of the Mobile County Circuit Court should be reversed.

Respectfully submitted,

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No. 17-7505
(Capital Case)

IN THE
Supreme Court of the United States

VERNON MADISON,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

ON WRIT OF CERTIORARI TO THE
MOBILE COUNTY, ALABAMA, CIRCUIT COURT

BRIEF FOR THE AMERICAN PSYCHOLOGICAL ASSOCIATION AND AMERICAN PSYCHIATRIC ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The American Psychological Association is the largest association of psychologists in the United States. A non-profit scientific and professional organization, the American Psychological Association has approximately 115,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among the American Psychological Association's major purposes are to increase and disseminate knowledge regarding human behavior, to advance psychology as a science and profession, and to foster the application of psychological learning to important human concerns, thereby promoting health, education, and welfare.

The American Psychiatric Association, with more than 37,800 members, is the largest psychiatric association in the United States and the nation's leading organization of physicians specializing in psychiatry. Members of the American Psychiatric Association engage in treatment, research, medical education, and forensic activities, and include many who work in the criminal justice system. The American Psychiatric Association and its members have substantial knowledge and experience relevant to the issues in this case.

Members of each amicus are regularly called before courts to participate in competency hearings. Amici therefore have pertinent expertise as well as a strong interest in the establishment of legal competency

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[1] No party authored this brief in whole or in part, and no one other than amici, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have filed blanket letters of consent to the filing of this brief.

standards consistent with the best scientific knowledge about individuals suffering from mental illness. Amici have filed briefs with this Court in similar cases, including *Panetti* v. *Quarterman*, 551 U.S. 930 (2007); *Ford* v. *Wainwright*, 477 U.S. 399 (1986); *Roper* v. *Simmons*, 543 U.S. 551 (2005); and *Atkins* v. *Virginia*, 536 U.S. 304 (2002) (via briefs submitted in *McCarver* v. *North Carolina*, *cert. dismissed*, 533 U.S. 975 (2001)).

In 2003, the American Bar Association established a Task Force on Mental Disability and the Death Penalty, which included mental-health professionals who are members and representatives of amici. The task force was convened in light of *Atkins* v. *Virginia*, to address unresolved issues concerning application of the death penalty to persons with impaired mental conditions, and in 2005 it presented a series of recommendations. *See Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668 (2006) (hereafter *Task Force Report*), *available at* https://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf. Of particular relevance here, the task force identified several situations in which it concluded the death penalty should not be applied to individuals with mental illness. One situation is where the individual, though having been determined competent to stand trial and sentenced to death, suffers from a severe mental disorder or disability that renders him or her unable to understand the nature and purpose of the death penalty. Such individuals include those whose mental illness worsens in material respects after the death sentence is imposed. Based on the task force's report, amici and the American Bar Association recommended, in sub-

stantially similar form, that the death penalty should not be applied to this category of individuals.[2]

SUMMARY OF ARGUMENT

This Court has repeatedly emphasized the humanitarian concerns underlying the common-law prohibition on executing individuals who lack the capacity to prepare for execution. *See Ford*, 477 U.S. 399; *Panetti*, 551 U.S. 930. In one case, for example, the Court explained that executing someone who is incompetent has long been considered "a miserable spectacle" of "inhumanity and cruelty." *Ford*, 477 U.S. at 407. The Court has also noted, however, that articulating standards governing *who* is legally competent to be executed presents challenges. In its most recent statement directly addressing this issue, the Court held that a prisoner must have a "rational understanding" of the rationale for an execution—while acknowledging that "a concept like rational understanding is difficult to define." *Panetti*, 551 U.S. at 959.

The court below rejected petitioner Vernon Madison's claim that he lacks a "rational understanding" of the reason for his impending execution. The court determined that he was competent to be executed even though he has experienced marked cognitive decline after multiple strokes, including impairments to his working memory, expressive capacity, and day-to-day

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[2] In addition to the recommendation discussed in the text, the task force presented, and amici and the ABA adopted, recommendations regarding individuals with mental retardation (now known as developmental intellectual disabilities) and equivalent impairments of intellectual and adaptive functioning, persons who were mentally ill at the time of the offense, and persons not competent to seek or assist counsel in post-conviction proceedings.

independence. This ruling—and the narrow interpretation of "rational understanding" that it reflects—fails to account for the common-law concerns (embraced in both *Ford* and *Panetti*) that prohibit executions of people who are incompetent.

In Part I of this brief, amici explain that based on the common law and this Court's precedent, it is cruel and unusual punishment to execute an individual with severe vascular dementia—a disease for which there is no cure, and which often causes debilitating cognitive impairments of the type that afflict Mr. Madison. In Part II, amici explain that mental-health experts can assist courts in identifying prisoners with severe dementia through the use of modern brain imaging, standardized clinical assessments, and instruments to detect malingering.[3]

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[3] The leading reference on the classification of mental disorders now refers to dementia as "major neurocognitive disorder." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 602 (5th ed. 2013) (hereafter "DSM-5"). Similarly, vascular dementia is now referred to as "major vascular neurocognitive disorder." *Id.* at 621.

ARGUMENT

I. EXECUTING AN INDIVIDUAL WITH SEVERE COGNITIVE IMPAIRMENTS CAUSED BY VASCULAR DEMENTIA CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

A. Humanitarian Concerns Rooted In The Common Law Animated This Court's Holdings That It Is Unconstitutional To Execute People Who Are Mentally "Incompetent"

This case concerns the circumstances under which a defendant with mental impairments may be executed. This Court has considered that issue twice before. In *Ford*, the Court held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409-410. And in *Panetti*—which recharacterized the inquiry as "competency" rather than "sanity," *see* 551 U.S. at 935—the Court held that a defendant is competent to be executed only if he can "comprehend[] the meaning and purpose of the punishment," *id.* at 960, and is able to "reach a rational understanding of the reason for the execution," *id.* at 958.

In both cases, the Court looked to the common law and the underlying humanitarian concerns implicated in executing an individual whose mental illness precludes a rational understanding of his punishment. In *Ford*, for example, the Court relied on the common-law prohibition on executing the insane, a prohibition grounded in several justifications. *See* 477 U.S. at 407. These justifications, the Court explained, include that executing an insane person "simply offends humanity"; that doing so "provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment"; and that it is "uncharitable to dispatch an offender into another

world, when he is not of a capacity to fit himself for it." *Id.* (quotation marks omitted).

The Court re-emphasized these principles twenty years later in *Panetti*. In particular, the Court quoted what it described as *Ford*'s "foundation" for its holding, including (1) "serious[] question[s]" about "the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life"; and (2) "the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity." *Panetti*, 551 U.S. at 957 (quoting *Ford*, 477 U.S. at 409). Applying those principles, the Court rejected an unduly narrow definition of incompetence for this purpose, rejecting in particular "the proposition that a prisoner is automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reason for his execution." *Id.* at 959. "A prisoner's awareness of the State's rationale for an execution," the Court expounded, "is not the same as a rational understanding of it." *Id.* At the same time, the Court acknowledged that "a concept like rational understanding is difficult to define," *id.*, and thus did not "attempt to set down a rule governing all competency determinations." *Id.* at 960-961. In explaining its reasoning, however, the Court repeatedly emphasized the need to consider "the principles set forth in *Ford*." *Id.* at 959.

Consistent with *Ford* and *Panetti*, amici submit that humanitarian considerations rooted in the common law should guide courts' analysis of whether executing defendants like petitioner Vernon Madison violates the Eighth Amendment.

B. The Effects Of Vascular Dementia Deprive Individuals Like Mr. Madison Of A "Rational Understanding" Of The Connection Between Crime And Punishment

The humanitarian considerations underlying *Ford* and *Panetti* apply with equal force to individuals who, like Mr. Madison, have cognitive decline associated with vascular dementia.

The severe cognitive effects of vascular dementia are prevalent and well-documented—and those afflicted by them may often lack a rational understanding of the reason why they would be executed. Executing a defendant under those circumstances would "offend[] humanity" and fail to serve "the community's quest for retribution." *See Ford*, 477 U.S. at 407-408.

1. Individuals with vascular dementia often lose the cognitive capacity to handle the demands of everyday life

Vascular dementia is a disease (often progressive) for which there is no FDA-approved treatment. *See* Raj N. Kalaria et al., *Stroke Injury, Cognitive Impairment, and Vascular Dementia*, Biochimica et Biophysica Acta 1862: 915, 921 (2016); Poornima Venkat et al., *Models and Mechanisms of Vascular Dementia*, 272 Exp. Neurol. 97 (Oct. 2015). As with any form of dementia, the symptoms of vascular dementia and the speed at which it progresses may vary. But there are several unifying characteristics, which allow for consistent diagnoses as well as an overall picture of how the disease presents.

Age-related dementia (of which vascular dementia is one type) is "an irreversible condition resulting in progressive cognitive decline," and is "one of the lead-

ing health problems of our time." Constantino Iadecola, *The Pathobiology of Vascular Dementia*, 80 Neuron 844, 844 (2013). It is "associated with a number of deficits in intellectual and adaptive functioning ... and disturbances in executive functioning connected with planning, organizing, sequencing, and abstracting." *Task Force Report*, 30 Mental & Physical Disability L. Rep. at 669-670. Indeed, as the Task Force on Mental Disability and the Death Penalty explained, "the only significant characteristic that differentiates [this] severe disabilit[y] from mental retardation is the age of onset." *Id.*

The diagnostic criteria for dementia or major neurocognitive disorder are: (1) "[e]vidence of significant cognitive decline from a previous level of performance in one or more cognitive domains," including learning and memory, language, executive function, complex attention, perceptual-motor, or social cognition; (2) cognitive deficits creating "interfere[nce] with independence in everyday activities"; (3) cognitive deficits that do not occur "exclusively in the context of a delirium"; and (4) lack of a superior explanation for the cognitive deficits. DSM-5 at 602.

Vascular dementia in particular is characterized by a reduced blood flow to the brain, often caused by strokes or microvascular disease. DSM-5 at 621-622. When diagnosing vascular dementia, a clinician relies on history, physical examination, and neuroimaging. *Id.* at 622. Vascular dementia is often associated with physical deficits causing additional disability, as well as mood changes and executive dysfunction. *Id.* at 622-623.

Patients with vascular dementia following a stroke may have symptoms that are distinct from other forms

of dementia, based on the part or parts of the brain affected by the stroke. *See* Stroke Ass'n, *Factsheet 29: Dementia After Stroke* 3 (Apr. 2012), *available at* http://www.stroke.org.uk/sites/default/files/Dementia%20after%20stroke_0.pdf. These effects include incontinence, communication problems (including difficulty following conversations), and mood changes. *Id.* As the disease progresses, a patient with vascular dementia may become unable to carry out everyday tasks, including hygiene-related ones, and become forgetful and confused about his or her surroundings. *Id.* Patients in the later stages of dementia "might not be able to express themselves or understand what is said to them," and may need to use a wheelchair or become bedridden. *Id.* at 3-4. There are no approved therapies to treat vascular dementia. *See* Kalaria, *supra*, at 921. Without a way to treat the underlying lack of blood flow causing a patient's vascular dementia and repair damaged brain regions, there is little hope of stopping the disease or its progression. *Id.*

2. Vernon Madison's medical history demonstrates dementia's severe impact on cognitive function and functional activities of daily living

In earlier proceedings involving Mr. Madison, both his expert and Alabama's expert, as well as all three Eleventh Circuit judges who heard his case, agreed that Mr. Madison suffered from multiple strokes and significant cognitive decline. *See Madison* v. *Commissioner*, 851 F.3d 1173, 1179-1180, 1185-1186 (11th Cir. 2017), *vacated sub nom. Dunn* v. *Madison*, 138 S. Ct. 9 (2017) (per curiam); *id.* at 1190 (Jordan, J., dissenting). The record in those proceedings indicates in particular that Mr. Madison suffers from deteriorating cognitive

functioning. In addition to other symptoms characteristic of late-stage vascular dementia, such as incontinence and inability to walk unassisted, Mr. Madison is experiencing progressive and marked intellectual and adaptive decline. According to the report of his expert, Dr. John Goff, Mr. Madison's declining brain function has left him with a working memory score of 58 (scaled to a mean of 100)—representing a "very substantial deficit in regard to working memory." ECF No. 8-3 at 17, *Madison* v. *Dunn*, No. 1:16-cv-00191-KD-M (S.D. Ala. 2016) (hereafter "Goff Report"). Mr. Madison is also "unable to rephrase simple sentences," "perform simple mathematical calculations either mentally or on paper," draw a clock, recite the alphabet, or count by threes. *Id.* at 16-18. Moreover, his "[l]ogical memory for verbal material was very poor," and he could not recall any of the 25 elements from a brief story. *Id.* at 16.

These deficits interfere with Mr. Madison's ability to form a rational understanding of his punishment and its relationship to his crime of conviction. Mr. Madison does not remember the sequence of events from crime to arrest to trial, nor the underlying facts, including his victim's identity. Goff Report, *supra*, at 18. As Dr. Goff noted, "In terms of the reasoning behind the execution [Mr. Madison] indicates that he does not believe that he ever killed anybody." *Id.* In these circumstances, and in light of the progressive nature of his disease, there is strong evidence that Mr. Madison's understanding of the purpose of his impending execution, as well as his ability to process the explanations given to him, are severely impaired.

3. The humanitarian concerns underlying *Ford* and *Panetti* apply with equal force to individuals whose rational understanding is significantly impaired by vascular dementia

Although this Court has "established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual," *Roper*, 543 U.S. at 561 (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)), this case does not call for any significant evolution beyond *Ford* and *Panetti*. As noted, the Court's decision in each of those cases was driven by various considerations grounded in common law. Common-law principles likewise require the conclusion that the execution of individuals like Mr. Madison violates the Eighth Amendment.

To be sure, given the rarity at common law of lengthy delays in carrying out capital sentences, *see Lackey* v. *Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting the denial of certiorari), it would have been quite unusual for prisoners condemned to death at common law to experience significant cognitive impairment and attendant declines in intellectual and adaptive functioning after sentencing. The infirmities associated with vascular dementia, moreover, do not always map cleanly onto the concept of a "rational understanding" of the reason for execution, *Panetti*, 551 U.S. at 956. Hence, under a narrow interpretation of that phrase, one might view Mr. Madison as having a rational understanding, given his ability to recognize that "he was tried and imprisoned for murder and that Alabama [would] put him to death as punishment for that crime," *Dunn*, 138 S. Ct. at 12.

But the common-law principles animating *Ford* and *Panetti* foreclose such a narrow interpretation of the "rational understanding" standard. As the Court explained in *Ford*, courts at common law considered whether a prisoner facing capital punishment was "of a capacity to fit himself" for death or able to "come to grips with his own conscience or deity," 477 U.S. at 407, 409. Individuals, including those with moderate to severe dementia, who lack sufficient cognitive capacity to handle the demands of everyday life cannot be said to possess sufficient cognitive capacity to do either of these. Although many of these individuals may, like Mr. Madison, appear to show some "awareness of the State's rationale" for execution, *see Panetti*, 551 U.S. at 959, their cognitive limitations preclude them from having a true "rational understanding" or appreciation of the purpose of their punishment.[4]

Executing an individual suffering from moderate to severe vascular dementia offends humanitarian principles for additional reasons that are not strictly tied to the question of rational understanding. It "simply offends humanity," and "contributes nothing to ... deterrence," *Ford*, 477 U.S. at 407, to execute someone suffering the extreme physical and mental limitations that vascular dementia has inflicted on Mr. Madison. Or as the Court put it in *Ford*, "execution serves no purpose in these cases because madness is its own punishment." *Id.*.

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[4] Nothing in this Court's ruling last year in Mr. Madison's habeas case precludes this interpretation of "rational understanding." To the contrary, the Court expressly stated that it was "express[ing] no view on the merits of the underlying question [i.e., the exact scope of *Ford* and *Panetti*] outside the AEDPA context." *Dunn*, 138 S. Ct. at 12.

II. Mental-Health Professionals Can Reliably Diagnose Severe Neuropathology And Determine An Individual's Capacity

The conclusion that an assessment of a prisoner's rational understanding should take into account his or her overall cognitive capacities—which may be reflected in intellectual and functional incapacities more broadly—is fully consistent with the approaches of modern medicine and psychology. Psychologists, psychiatrists, non-psychiatric physicians, and other experts can reliably conduct a rigorous and reliable evaluation of capacity, and thereby provide consistent and meaningful assistance to courts in making the necessary determinations.

A. Mental-Health Professionals Can Use Brain Imaging To Diagnose Vascular Injury

Recent advances in brain imaging have made mental-health professionals particularly adept at identifying brain damage leading to dementia. Through magnetic resonance imaging and computed tomography, for example, a medically trained professional can identify the signs of cerebrovascular disease, including large vessel infarcts or hemorrhages, "strategically placed" infarcts and hemorrhages (such as in the crucial areas of the angular gyrus, the thalamus, or the basal forebrain), and white matter lesions. DSM-5 at 622. Indeed, so advanced and reliable is the technology that diagnosis of probable vascular neurocognitive disorder now requires "the demonstration of abnormalities on neuroimaging" for "[e]tiological certainty." *Id.*

Precise neuroimaging, coupled with an understanding of a patient's medical history, also allows medically trained professionals to assess the extent and location

of a patient's brain damage, and to determine what cognitive effects could be expected from this brain damage. Kalaria, *supra*, at 916. Damage to the prefrontal-subcortical circuit, for instance, can create executive dysfunction, while damage to the frontal lobe can create dysfunction in processing speed, reaction time, and working memory, and strokes in the angular gyrus, medial frontal lobe, and various other locations can lead to "strategic infarct dementia," creating diminished cognitive capacity. *Id.* When cognitive decline can be temporally linked with the patient's brain damage, moreover, the diagnosis can be even more reliable. *See* DSM-5 at 622.

B. Mental-Health Professionals Regularly Assess Capacity To Appreciate Information

Using the diagnostic technology just discussed, as well as their own evaluative techniques, mental-health professionals regularly evaluate an individual's capacity to appreciate information—a key component of "rational understanding." Indeed, the evaluation of an individual's capacity to appreciate information is a fundamental and uncontroversial aspect of forensic mental-health assessment that can be readily performed by mental-health professionals.

Studies show that mental-health professionals using structured interviews and assessing present-oriented functional capacities typically show very high levels of agreement. *See, e.g.*, Gary B. Melton et al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* 148 (4th ed. 2017). The central feature of the mental-health professional's effort to assess an individual's mental functioning in relation to competency for execution is the clinical interview. The interview may begin with gen-

eral, factual questions such as: "Why are you in prison?" and "Why have you been sentenced to death?" After establishing the factual framework, the interviewer might then address the examinee's rational understanding with questions like: "Will you be executed?" and "What preparations have you made in anticipation of your execution?" *See, e.g.*, Patricia A. Zapf et al., *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist*, 21 Behav. Scis. & L. 103, 117-119 (2002). To the expert forensic psychologist or forensic psychiatrist, the answers to these questions reveal much about the subject's mental capacities, and if necessary follow-up questions can probe ambiguous replies. In addition, the clinician will consult collateral sources of information, including prison personnel, family members, and attorneys, as well as the individual's treatment records and mental-health history. Kirk Heilbrun, *Principles of Forensic Mental Health Assessment* 99-107 (2001); *see also* Mark A. Small & Randy K. Otto, *Evaluations of Competency to be Executed: Legal Contours and Implications for Assessment*, 18 Crim. Just. & Behav. 146, 154-155 (1991).

Mental-health professionals are also trained to assess an individual's everyday functional capacities, which amici submit a court should consider as part of its analysis of whether a prisoner is competent to be executed. Professionals must regularly assess older adults' ability to perform "instrumental activities of daily living," including managing finances, health, and functioning in the home and community. American Bar Ass'n Comm'n on Law and Aging, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* 25 (2008). There are standardized guidelines for assessing these abilities, through clinical interviews, observation, and where possible, collateral

reports. *Id.* at 25, 31-32. In making the assessment, clinicians may also employ a battery of cognitive tests for skills such as attention, language, and executive functioning, which may also affect an individual's functioning capacity. *Id.* at 39. An individual's inability to perform instrumental activities of daily living factors into the clinician's assessment of the person's other functional capacities, including testamentary capacity and capacity to consent to medical care. *See id.* at 16, 17. These capacities are relevant to an individual's competency to be executed; someone who lacks the ability to make medical decisions or draw up a will can hardly be said to be able to "fit himself" for death, *Ford*, 477 U.S. at 407.

Thus, through well-established procedures that tend to produce agreement among diagnosticians, mental-health experts can provide testimony that can meaningfully inform judicial decisions about competency to be executed.

C. Mental-Health Professionals Have Developed Valid And Reliable Methods To Identify Persons Feigning Impairment

Although both sides' experts concluded that Mr. Madison's dementia and associated symptoms were not feigned, an obvious concern with any capacity standard is that some prisoners will malinger, i.e., fake impairment, in an effort to be adjudicated incompetent to be executed. That concern is substantially mitigated, however, because psychologists, psychiatrists, and other mental-health professionals can employ a variety of techniques and tests to reliably identify people who are exaggerating or fabricating impaired emotional, behavioral, and/or cognitive impairments. *See Clinical As-*

sessment of Malingering and Deception (Richard Rogers & Scott D. Bender eds., 4th ed. 2010).

For example, in addition to the imaging tests discussed above, mental-health professionals evaluating prisoners consider factors like whether reported symptoms are consistent with what is known about genuine mental disorders and how they manifest, as well as the prisoner's presentation over time and across various contexts and situations (as documented in medical, mental-health, and correctional records). Furthermore, some psychological tests can aid in discriminating between prisoners who are and are not genuinely impaired. Some of these tests involve scales designed to identify examinees who are feigning impairments. *See, e.g.*, Personality Assessment Inventory; Minnesota Multiphasic Personality Inventory-2-RF. Other tests can identify persons exaggerating symptoms of psychosis or impaired cognitive functioning. *See* Structured Interview of Reported Symptoms-2; Miller Forensic Assessment of Symptoms Test; Word Memory Test; Test of Memory Malingering; Validity Indicator Profile. Put simply, although detecting every instance of malingering is impossible, expert examiners' ability to detect it is sufficiently strong that the risk of malingering should not preclude courts from considering everyday functional capacity in their assessment of rational understanding. As explained, applying that concept here leaves no doubt that Mr. Madison lacks a rational understanding, such that his execution would violate the Eighth Amendment.

CONCLUSION

The judgment of the Mobile County Circuit Court should be reversed.

Respectfully submitted.

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Supreme Court of the United States

VERNON MADISON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Association of Police Organizations ("NAPO") is a coalition of police units and associations from across the United States.[1] It was organized for the purpose of advancing the interests of America's law enforcement officers. Founded in 1978, NAPO is the strongest unified voice supporting law enforcement in the country. NAPO represents over 1,000 police units and associations, over 241,000 sworn law enforcement officers, and over 100,000 citizens who share a common dedication to fair and effective law enforcement. NAPO often appears as *amicus curiae* in cases of special importance to the law enforcement community. *E.g.*, *Mullenix v. Luna*, No. 14-1143 (2015); *Arizona v. Gant*, No. 07-542 (2009).

Since its founding, NAPO has had a significant impact on legislation affecting the vital interests of law enforcement officers in the United States. For example, in 2017 and 2018, NAPO endorsed several pieces of legislation in Congress that seek to increase penalties for those who target law enforcement officials, including: the Blue Lives Matter Act, which provides for enhanced federal prosecution against any individual who kills, attempts to kill, assaults, or otherwise inflicts bodily injury against a federally-funded state or local law enforcement officer; the Thin Blue Line Act, which would make a murder victim's status as a state or local law enforcement officer an

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

aggravating factor in death penalty determinations; and the Back the Blue Act, which would increase the penalties for those who harm or target for harm police officers by making the murder or attempted murder of an officer an aggravating factor in death penalty determinations.

NAPO has a powerful interest in this case because it represents law enforcement officers who are not only vital agents of the justice system but are also precisely who Alabama's policy seeks to protect. The murder victim in this case was a police officer, Corporal Julius Schulte. Petitioner Vernon Madison shot Cpl. Schulte in the back of the head simply because he was doing his job—protecting Madison's ex-girlfriend and her daughter from harm. Alabama defines the murder of a police officer as a capital offense. A reversal of the Alabama court would undermine the expressed will of the people of Alabama and create undue risk to their law enforcement officers. Madison's argument—that he should not be held culpable for murdering Cpl. Schulte because he cannot remember killing him—insults the memory of police officers who are killed in the line of duty. NAPO thus writes to urge the Court to affirm.

INTRODUCTION AND SUMMARY OF ARGUMENT

Corporal Julius Schulte faithfully served the people of Mobile County, Alabama for 22 years.[2] Cpl. Schulte spent his entire career with the Mobile Police Department,

2. *See* Kelsey Stein, *Mobile Police Officer Julius Schulte Selflessly Helped City's Youth Before His Death in the Line of Duty*, Ala. Media Group (May 11, 2016), https://bit.ly/2M50zbX.

beginning in the early 1960s and ending when he was fatally shot by Petitioner Vernon Madison on April 18, 1985.

That night, Cpl. Schulte was investigating a report that Cheryl Ann Greene's young child was missing. Cpl. Schulte spoke with Ms. Greene and waited at the house for another officer to arrive. Ms. Greene and Madison, her boyfriend, got in a heated argument while Cpl. Schulte stayed in the car. Cpl. Schulte never threatened Madison and never pulled his gun; instead, he calmly told Madison, "Son, just get your things and go."

According to multiple witnesses Madison pretended to leave, but then retrieved a pistol, crept behind the car where Cpl. Schulte was sitting, and fired two shots into the back of Cpl. Schulte's head. He then turned on Ms. Greene and shot her in the back as she fled. Seconds before backup arrived, Madison fled from the scene.

Suffering two gunshot wounds to the head, Cpl. Schulte died a week later. He received numerous posthumous awards, including a medal of honor from the American Police Hall of Fame, a Medal of Valor from the Exchange Club of Mobile, and a proclamation from both houses of the Alabama Legislature.[3] And his name is engraved on the National Law Enforcement Officers Memorial in Washington DC's Judiciary Square. *See* National Law Enforcement Officers Memorial Fund, Julius Norman Schulte, https://bit.ly/2MokBLz.

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3. Over a quarter-century after his death, Cpl. Julius Schulte still receives well-wishes and reflections from friends and family on his memorial page. ***See Family, Friends & Fellow Officers Remember...***, Officer Down Memorial Page, Corporal Julius Norman Schulte, https://bit.ly/2LXb4ig.

State and federal legislators have recognized the need for criminal codes to include heightened penalties for those who target and kill law enforcement officers. The need for heightened penalties is based on the recognition that our law enforcement officers are placed in harm's way to protect our communities. At the federal level, the murder of federal police officers is already an aggravating factor in death penalty determinations. A strong movement seeks to extend that provision to state and local police officers. And there are new federal legislative efforts to add more protection for police officers against those who seek to harm them.

The movement to protect law enforcement extends well beyond the federal level. Most states still allow the death penalty, and nearly all of those states consider the murder of a police officer as an aggravating factor. Even in those states that have abolished capital punishment, protection of police officers has been a driving force of those seeking to reinstitute the death penalty. The protection of law enforcement via the death penalty receives strong support on both the federal and state levels.

This protection of law enforcement via the treatment of the murder of a police officer as an aggravating factor has been expressly recognized by this Court. The Court has acknowledged the validity of considering the murder of police officers as an aggravating factor in death penalty determinations. It has recognized the special interest that society has in protecting police officers and has noted the legitimate function the death penalty plays in guarding this interest.

Moreover, the death penalty is not merely protective of the nation's officers. Capital punishment is a valid expression of community outrage against violent crimes. As this Court has recognized, the killing of a police officer gives rise to the outrage-based special interest of society. The death penalty plays an important role in avenging the egregious wrongs committed against police officers.

ARGUMENT

I. There Is Nationwide Support for Increased Penalties for the Murder of Law Enforcement Officers.

This Court has recognized the important role of the *people* in determining the appropriate level of punishment under the Eighth Amendment. When a punishment is selected by a democratically elected body, the Court must "presume its validity." *Gregg v. Georgia*, 428 U.S. 153, 175 (1976), The legislatures, not the courts, respond to the will and moral values of the people. *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C. J., dissenting). Therefore, the Court's assessment of contemporary standards must give heavy weight to legislative judgment. *Gregg*, 428 U.S. at 175.

When it comes to the punishment of those who kill police officers, the judgment of the people is clear. There is a long tradition of increased penalties for the murder of police officers. This tradition recognizes that, because police officers are routinely involved in dangerous and combustible confrontations, increased penalties are needed to deter violent assaults against them.

Both federal and state law strongly protect police officers. Federal law provides increased penalties for those who murder law enforcement officials. *See* 18 U.S.C. § 3592(c)(14)(D). In determining "whether a sentence of death is justified," the killing of a federal police officer while the officer is performing official duties is considered as an "aggravating factor." *Id.*

There is also strong federal support for *more*—not less—protection for police officers. The United States House of Representatives recently passed the Thin Blue Line Act, which would amend the U.S. criminal code to add the killing of a state or local law enforcement officer as an aggravating factor when determining whether a death sentence is justified. *See* Thin Blue Line Act, H.R. 115, 115th Cong. (2017). The Act has received widespread support from NAPO and others in the law enforcement community, including the National Fraternal Order of Police, the Sergeants Benevolent Association, and the Major County Sheriffs of America. *See NAPO Victory! House Passes Thin Blue Line Act*, The Wash. Rep. (May 22, 2017), https://bit.ly/2n7J5xt. Every advocate cited increased police officer deaths as a reason for their support. *Id.* The Thin Blue Line Act garnered 271 votes in the House of Representatives, boasting bipartisan support and remains pending in the Senate. 163 Cong. Rec. 4341 (2017); The Wash. Rep., *supra*, at 2.

Congress has also sought increased penalties for those who inflict bodily harm on police officers. In May 2018, the House of Representatives passed The Protect and Serve Act of 2018, which is designed to heighten federal punishments for people who knowingly attempt to cause "serious bodily injury" to a law enforcement officer or individual who is perceived as a law enforcement officer.

The Protect and Serve Act of 2018, H.R. 5698 (115th Cong.) (2018). The bill received broad bipartisan support, passing on a vote of 382-35. *See* H.R. 5698—Protect and Serve Act of 2018, Congress.Gov, https://bit.ly/2KvulSd.

As the Bill's co-sponsor, Representative John Rutherford explained, "[s]adly, we've seen a recent rash and an increase in violence against officers especially in ambush-style attacks.... We as members of Congress must show the law enforcement community across this country that we support them and the important work that they do day in and day out. We must also show that those who wish to target police officers with violence that those attacks will not be tolerated." Deborah Barfield Berry, *House Passes Tough Penalties for Those Who Attack, Ambush Law Enforcement Officers*, USA Today, May 17, 2018, https://usat.ly/2M4pKLD.

The bill has received strong support from NAPO and other law-enforcement groups for good reason: There is a serious and growing trend of armed attacks on law enforcement officers. According to a December 2017 report from the Office of Community Oriented Policing Services (COPS) and the National Law Enforcement Officers Memorial Fund, 2016 saw a significant increase in ambush attacks on unsuspecting officers, with 21 officers shot and killed. *See NAPO Victory! House Passes Protect & Serve Act*, NAPO (May 17, 2018), https://bit.ly/2KxgOVB. Of these officers, 61% were not answering a call for service or engaged in enforcement action or performing official duties—they were targeted and killed just for the uniform they wore. *Id.* Twelve officers were murdered sitting in their patrol cars. *Id.* This legislation is evidence of a focused federal initiative to protect police officers across the nation.

States similarly protect law enforcement officers. All 50 states have laws in place that enhance penalties for crimes against law enforcement officers, and in some instances, crimes against a broadly defined category of first responders. *See* Protect and Serve Act of 2018, H. Rep. 115-672 at 8 (May 11, 2018). In 28 out of the 31 states that employ the death penalty, the capital statute either specifically indicates that killing a law enforcement officer or peace officer is an aggravating factor that would make the defendant eligible for the death penalty or defines the act itself as a capital or capital-eligible offense.[4] The remaining three identify the targeting of a police officer while evading arrest as an aggravating factor that would make the defendant eligible for the death penalty.[5]

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4. Ala. Code § 13A-5-40(a)(5) (2016); Ariz. Rev. Stat. Ann. § 13-751(F)(10) (2010); Ark. Code Ann. § 5-10-101(a)(3) (West 2008); Cal. Penal Code §190.2(a)(7) (West 2014); Colo. Rev. Stat. Ann. § 18-13-1201(5)(c)(I) (West 2013); Fla. Stat. § 921.141(6)(j) (2016); Ga. Code Ann. § 17-10-30(b)(8) (West 2014); Idaho Code §§ 18-4003(b), -4004 (2017); Ind. Code § 35-50-2-9(b)(6) (2016); Ky. Rev. Stat. Ann. § 532.025(2)(a)(7) (2017); La. Stat. Ann. § 14:30(a)(2), (C)(1) (2016); Miss. Code Ann. § 97-3-19(2)(a) (2017); Mont. Code Ann. § 46-18-303(1)(b) (2017); Mo. Rev. Stat. § 565.032(2)(5) (2016); Neb. Rev. Stat. § 29-2523(1), (g)-(i) (2016); Nev. Rev. Stat. § 200.033(7) (2015); N.H. Rev. Stat. Ann. § 630:1(I)(a) (2016); N.C. Gen. Stat. § 15A-2000(e)(8) (2017); Okla. Stat. tit. 21, §§ 701.9(a), 701.12(8) (2017); Or. Rev. Stat. § 163.095(2)(a) (2015); 42 Pa. Cons. Stat. § 9711(d)(1) (2016); S.C. Code Ann. § 16-3-20(C)(a)(7) (2017); S.D. Codified Laws § 23A-27A-1(7) (2017); Tenn. Code Ann. § 39-13-204(i)(9) (2017); Tex. Penal Code Ann. § 19.03(a)(1) (2017); Utah Code Ann. § 76-5-202(1)(n)(3) (West 2017); Va. Code § 18.2-31(6) (2017); Wash. Rev. Code § 10.95-020(1) (2016).

5. Kan. Stat. Ann. § 21-6624(e) (2016); Ohio Rev. Code Ann. § 2929.04(A)(3) (West 2016); Wyo. Stat. Ann. § 6-2-102(h)(v) (2017).

Like the federal government, state governments continue to seek more protections for police officers. For example, on February 2, 2017, the Georgia Senate adopted a resolution encouraging district attorneys to seek the death penalty against defendants accused of murdering law enforcement officers. S.R. 140, 154th Gen. Assemb., Reg. Sess., (Ga. 2017). The resolution recognized the "great personal sacrifice and risk to their own lives and well-being" that law enforcement officers face. *Id.* Moreover, "the offense of murder against a law enforcement officer is an offense that impacts the safety of the citizens of this state." *Id.* A month later, Utah enacted a law classifying the murder of a law enforcement officer as "aggravated murder." H.B. 433, 2017 Gen. Sess. (Ut. 2017); *see* Utah Code Ann. § 76-5-202(1)(n)(3) (West 2017). These recent enactments reflect the continued commitment to protect law enforcement officers through capital statutes.

Even in states that have abolished capital punishment, the killing of law enforcement officers often ignites calls for reinstating the death penalty. For example, many in Massachusetts are seeking to reimpose the death penalty after a police officer was killed.[6] Steve LeBlanc, *Police Officer Murder Renews Calls for Death Penalty in Massachusetts*, CBS Boston (Apr. 18, 2018), https://cbsloc.al/2OPrSpl. Illinois Governor Bruce Rauner is similarly seeking to reinstate the death penalty for individuals who kill law enforcement officers.[7] Mark Berman, *Illinois*

6. The Massachusetts Supreme Judicial Court ruled in 1984 that imposing a death penalty by jury trial in violation of state law was unconstitutional. *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 134 (Mass. 1984).

7. The Illinois legislature abolished the death penalty in 2011. 725 Ill. Comp. Stat. Ann. 5/119-1 (West 2011).

Governor Wants the State to Revise Its Death Penalty for Mass Murderers and People Who Kill Police, Wash. Post (May 14, 2018), https://wapo.st/2niE5q0. Capital punishment for those who kill police officers is a significant justification for the death penalty on the state level. Clearly, then, the people of our nation believe that the murder of a law enforcement officer warrants increased penalties.

II. The Death Penalty Serves an Important Function as an Expression of Community Outrage Against the Murder of Police Officers.

Petitioner seeks a nullification of his death sentence on the basis that he (allegedly) can no longer remember his crime or victim. But a primary purpose of capital punishment is to express community outrage over a murder. That goal has nothing to do with whether the defendant remembers his victim or his crime. The community's memory—including the law enforcement community's memory—is what matters.

This Court has long recognized the critical role that the death penalty plays in expressing society's abhorrence for heinous offenses. "[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct." *Gregg*, 428 U.S. at 183. "This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." *Id.* "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch

law." *Id.* (quoting *Furman*, 408 U.S. at 308 (Stewart, J., concurring)).

The objective indicia to which this Court looks plainly supports the death penalty in these types of cases. Society still supports applying the death penalty as a measure for unifying communities in response to crimes that they find particularly threatening to the functioning of society. Donald L. Beschle, *Why do People Support Capital Punishment? The Death Penalty as Community Ritual*, 33 Conn. L. Rev. 765, 774-75 (2001). A full 55% of American adults say they support the death penalty, despite this being the lowest since 1972. Jeffrey M. Jones, *U.S. Death Penalty Support Lowest Since 1972*, Gallup (Oct. 26, 2017), https://bit.ly/2Kyc1Ij.

Federal and state laws similarly recognize the role of the death penalty in expressing the community's moral outrage. For example, one of the "most ubiquitous aggravating factors" in considering whether the defendant is death penalty-eligible is whether the crime was committed in "'an especially heinous, cruel, or depraved manner.'" Sam Kamin & Justin Marceau, *Vicarious Aggravators*, 65 Fla. L. Rev. 769, 789 (2013) (quoting Colo. Rev. Stat. § 18-1.3-1201). Virginia, for example, which only has two death-qualifying factors, recognizes a killing that was "outrageously or wantonly vile" as deserving of the death penalty. *Id.* at 790 (quoting Va. Code § 19.2-264.2). Both this Court and many states recognize that the moral voice of the community must be permitted to speak.

The function of the death penalty as an expression of society's outrage is an overlooked aspect of capital punishment. Nonetheless, Supreme Court precedent

requires an analysis of society's moral standards of punishment. Where the utilitarian and retributive justifications of the death penalty are deeply contested, this is a vital task. The standards of the community are clear: the death penalty is an appropriate punishment, particularly for those who kill police officers.

Imposition of the death penalty requires weighing the aggravating and mitigating factors. The legislatures, courts, and communities across the United States agree that the killing of a police officer should receive significant weight in these determinations.

* * *

One of the primary ways the law enforcement community remembers the murder of police officers is through the National Law Enforcement Officers Memorial. The Memorial, located in Washington, D.C., honors federal, state and local law enforcement officers who have made the ultimate sacrifice for the safety and protection of our nation and its people. The Memorial features two curving, 304-foot-long blue-gray marble walls. Carved on these walls are the names of more than 21,000 officers who have been killed in the line of duty throughout U.S. history, dating back to the first known death in 1791. Unlike many other memorials in Washington, D.C., the National Law Enforcement Officers Memorial is ever-changing: new names of fallen officers are added to the monument each spring, in conjunction with National Police Week. *See* National Law Enforcement Officers Memorial Fund, https://bit.ly/2OdKaPR.

On the west wall of the memorial, surrounded by the names of thousands of other fallen police officers, is the name Julius N. Schulte. Whether Madison remembers it or not, Cpl. Schulte's name is there because Madison shot him twice in the back of the head more than thirty years ago. It would be deeply insulting to the law enforcement community for the Court to declare that Cpl. Schulte's murderer is less culpable now because he can no longer remember the victim of his crime.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this court affirm the judgment of the Alabama court.

Respectfully submitted,

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No. 17-7505

In the Supreme Court of the United States

VERNON MADISON, PETITIONER

v.

STATE OF ALABAMA

ON WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

BRIEF FOR THE STATES OF TEXAS, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, OKLAHOMA, SOUTH CAROLINA, AND TENNESSEE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

"[T]he authority of States over the administration of their criminal justice systems lies at the core of their sovereign status." *Oregon v. Ice*, 555 U.S. 160, 170 (2009). To administer those systems fairly and effectively, States need a coherent jurisprudence on the constitutional guarantees afforded defendants and prisoners. Petitioner's position, if adopted, would upend settled law in at least two respects.

First, petitioner claims that his inability to recall his crime deprives him of the "rational understanding" one needs to be competent to be executed. That same rational-understanding standard governs competence to stand trial, plead guilty, and waive counsel. And over the last half-century, federal and state courts have reached a consensus that lack of memory about a crime does not itself make a defendant incompetent in those contexts.

Second, petitioner suggests that his condition is analogous to intellectual disability, which categorically exempts a person from the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). But the rationale for that exemption hinges on the fact that intellectual disability develops in childhood, which undercuts the retributive and deterrent purposes of capital punishment. The same logic does not extend to conditions like petitioner's dementia that develop after sentencing.

Because petitioner puts at risk the doctrinal consistency of settled rules of criminal law, the amici States have an interest in opposing his arguments.[1]

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[1] This amicus brief is filed with the written consent of all parties as reflected on the docket.

SUMMARY OF ARGUMENT

I. Petitioner's claim that he is incompetent to be executed because he cannot recall committing the underlying offense clashes with uniform precedent on competency in criminal law. The standard for competence to be executed tracks the standard for competence to stand trial, plead guilty, and waive counsel. For each of those events, the person must have a "rational understanding" of the proceedings. That common metric means that cases involving competence at the trial stage provide useful guidance on the question of competence to be executed. And that is especially true here because the issue of whether amnesia renders a defendant incompetent has been frequently litigated in federal and state courts and a consensus rule has emerged: lack of memory about the events surrounding a crime does not itself make a defendant incompetent to stand trial, plead guilty, or waive counsel. It follows, then, that the same lack of memory about the crime does not cause a prisoner to be incompetent to be executed.

II. Petitioner also departs from precedent in arguing that his condition is analogous to intellectual disability, which exempts a person from the death penalty under *Atkins*. Early age of onset was material to *Atkins*'s reasoning in that intellectually disabled persons have diminished culpability for the crimes they commit, are less likely to be deterred from committing crimes by the possibility of execution, and face special risks of receiving the death penalty due to limitations on their functioning at trial. That logic does not extend to persons like petitioner who develop dementia and memory loss after being convicted and sentenced. Also, dementia and other mental illnesses are too variable for a categorical rule like *Atkins*. The existing standard suffices to protect

those whose underlying mental conditions in fact prevent them from rationally understanding their punishments and are therefore incompetent to be executed.

ARGUMENT

I. Loss of Memory About the Offense Does Not Make the Defendant Incompetent at Any Other Stage of a Criminal Proceeding.

Petitioner asserts that his current medical condition has left him without any memory that he killed a police officer, was convicted of murder, and received a sentence of death. Pet'r Br. 25. For that reason, he claims that he is incompetent to be executed. *Id.* But as explained below, because memory loss alone does not defeat competency at other stages of criminal proceedings, it does not render petitioner incompetent to receive his punishment.

A. "[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). Since *Ford*, the Court has restyled that prohibition as preventing States from executing a prisoner who is "incompetent to be executed." *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007).

The Court has not adopted a precise standard to determine whether a prisoner is incompetent to be executed. *Id.* at 960-61. But it has explained that the "substantive federal baseline" for competency "does not foreclose inquiry" into whether a prisoner has a "rational understanding" of the reason for the execution. *Id.* at 935, 958, 959. Based on that explanation, most circuits have read *Panetti* to require that a prisoner have a "rational understanding" of his death sentence and the reason for it. *E.g.*, *Ferguson v. Sec'y, Fla. Dep't of Corrs.*, 716 F.3d 1315, 1335-36 (11th Cir. 2013); *Green v. Thaler*, 699 F.3d

404, 418 (5th Cir. 2012); *Bedford v. Bobby*, 645 F.3d 372, 378 (6th Cir. 2011) (per curiam).

That "rational understanding" standard mirrors the test used to assess other kinds of competency in criminal proceedings. To be competent to stand trial, a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). The same "rational understanding" is required to show competence to plead guilty and to waive the right to counsel. *Godinez v. Moran*, 509 U.S. 389, 398-400 (1993).

Not only do these competency standards all use the same "rational understanding" wording, but they are also procedurally linked. If a prisoner was adjudged competent to stand trial, or if his competency at that stage was "sufficiently clear as not to raise a serious question," a State may presume that he is also competent to be executed when carrying out his death sentence. *Ford*, 477 U.S. at 425-26 (Powell, J., concurring); *see also Panetti*, 551 U.S. at 949 (explaining that, under the rule of *Marks v. United States*, 430 U.S. 188 (1977), Justice Powell's opinion in *Ford* "sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim"). Of course, a prisoner may seek to rebut that presumption and show that, since trial, he has become incompetent to be executed. But even then, a State may require "a substantial threshold showing" of incompetency to trigger further proceedings. *Ford*, 477 U.S. at 426 (Powell, J., concurring).

B. The Court has not defined "rational understanding" for these related competency standards. *See Pan-*

etti, 551 U.S. at 959 (observing that "a concept like rational understanding is difficult to define"). But since that test was first adopted in *Dusky*, lower courts have generally concluded that a criminal defendant can have the required rational understanding even if he cannot recall the events surrounding the crime.

1. That conclusion is the consensus rule among the federal circuit courts of appeals. Each circuit has addressed this issue in the context of competence to stand trial. Those courts have unanimously said that failure to remember the crime, without more, does not make a defendant incompetent.[2] Rather, "an amnesiac defendant,

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[2] *Brown v. O'Brien*, 666 F.3d 818, 826 n.9 (1st Cir. 2012) (noting that "amnesia as to pertinent events . . . do[es] not automatically prevent a defendant from being tried or pleading guilty"); *United States v. Villegas*, 899 F.2d 1324, 1341 (2d Cir. 1990) ("A defendant's amnesia about events surrounding the crime will not automatically render him incompetent to stand trial."); *United States ex rel. Parson v. Anderson*, 481 F.2d 94, 96 (3d Cir. 1973) (per curiam) (concluding that "the fact that the defendant suffered amnesia as to the commission of the crime, does not, in and of itself, render the defendant incompetent to stand trial"); *United States v. Kendrick*, 331 F.2d 110, 114-15 (4th Cir. 1964) (per curiam) (noting that, on remand, expert opinion on the defendant's amnesia may still confirm his counsel's testimony that he was competent to stand trial); *United States v. Doke*, 171 F.3d 240, 248 (5th Cir. 1999) (reaffirming circuit precedent that "amnesia by itself does not render a defendant incompetent [to stand trial]"); *Dye v. Cowan*, 472 F.2d 1206, 1207 (6th Cir. 1972) (per curiam) (holding that "claims of limited lapses of memory are not in and of themselves evidence of mental incompetence to stand trial"); *United States v. Andrews*, 469 F.3d 1113, 1118 (7th Cir. 2006) (finding it "clear that amnesia alone does not render a defendant incompetent to stand trial"); *Davis v. Wyrick*, 766 F.2d 1197, 1202 (8th Cir. 1985) ("Amnesia alone is not a bar to the prosecution of an otherwise competent defendant."); *United States v. No Runner*, 590 F.3d 962, 965 n.2 (9th Cir. 2009) (noting that circuit courts "have uniformly held that amnesia regarding the

like any other defendant, must show that he is unable 'to satisfy the ordinary competency standard.'" *Andrews*, 469 F.3d at 1119 (quoting *Rinchack*, 820 F.2d at 1569).

Several circuits have indicated that memory loss alone does not impede a rational understanding of the proceedings because other sources of information can readily fill any memory gaps. *See, e.g., id.* at 1120 (family and friends; video evidence); *Doke*, 171 F.3d at 248 (prosecution's documents); *Villegas*, 899 F.2d at 1342 (witness testimony; government files); *Rinchack*, 820 F.2d at 1570 (trial transcripts; witness testimony); *Davis*, 766 F.2d at 1202 n.8 (eyewitness accounts; prior admissions); *Borum*, 464 F.2d at 900 (prosecution files; defense investigation); *Wilson*, 391 F.2d at 464 (other evidence). Perhaps for that reason, one circuit has suggested that it would be "exceptionally rare" for a defendant's lack of memory about a crime to lead to a finding of incompetence to stand trial. *Andrews*, 469 F.3d at 1119.

2. The state courts that have addressed this issue align with the federal circuits' consensus. The highest courts of 33 States have concluded that a defendant's inability to remember the crime does not itself render him incompetent to stand trial or plead guilty. *See* Appendix

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alleged crime does not constitute incompetence per se"); *United States v. Borum*, 464 F.2d 896, 900 (10th Cir. 1972) (rejecting claim that "amnesia is a *per se* deprivation of due process" and concluding that the *Dusky* standard was met "[e]ven if the loss of memory had been a genuine loss of memory"); *United States v. Rinchack*, 820 F.2d 1557, 1569 (11th Cir. 1987) (holding that "amnesia does not render a defendant automatically incompetent to stand trial"); *Wilson v. United States*, 391 F.2d 460, 464 n.4 (D.C. Cir. 1968) (explaining that defendants' "present awareness of their whereabouts and activities at the time of the crime" is not "an essential ingredient of competence" and that the court "has never considered such lack of memory as going directly to competence to stand trial").

A. Among the remaining States, nine intermediate appellate courts have adopted the same view. *See* Appendix B.

Like the federal circuits cited above, some state courts have reasoned that a defendant's amnesia about the crime may be analogous to "'missing' evidence," but it does not logically preclude the defendant from rationally understanding the nature and object of the proceedings. *Morris v. State*, 301 S.W.3d 281, 293 (Tex. Crim. App. 2009); *accord Reagon v. State*, 251 N.E.2d 829, 831 (Ind. 1969); *Morrow v. State*, 443 A.2d 108, 112 (Md. 1982); *State v. Willard*, 234 S.E.2d 587, 593 (N.C. 1977). From that premise, one court has concluded that it would be "an extraordinary case in which an inability to recall the charged event because of amnesia could constitute mental incapacity to stand trial." *Morris*, 301 S.W.3d at 293. Indeed, the amici States could find only one state appellate decision holding that amnesia about a crime sufficed to show incompetency. *State v. McIntosh*, No. 87-2215, 1988 WL 126494, at *8-9 (Wis. Ct. App. Aug. 25, 1988) (unpublished). And even there, the issue was not the defendant's lack of rational understanding, but rather the fact that "critical evidence . . . could not be extrinsically reconstructed without his testimony, and the strength of the state's case was not such as to negate his reasonable hypothesis of innocence." *Id.* at *9.

C. Because the mere inability to recall committing a crime does not prevent a defendant from rationally understanding the proceedings for purposes of standing trial, pleading guilty, or waiving counsel, and because the same rational-understanding standard measures competency at the execution stage, it follows that a prisoner's failure to remember his capital offense does not render him incompetent to be executed.

If anything, memory loss is even less relevant in the execution context. As discussed above, most courts have identified a defendant's inability to relay or reconstruct events as the primary difficulty posed by amnesia at trial. But, again, even that obstacle does not itself negate the defendant's competence to proceed because the facts can be developed by other means. That concern should be virtually non-existent by the time an execution date is set. At that point, the defendant will have either pleaded guilty or been tried and proven guilty beyond a reasonable doubt, and he will have exhausted available appeals and post-conviction challenges.

If the Court were to accept petitioner's argument, it would inevitably raise doubts about the longstanding consensus that memory loss alone does not make a defendant incompetent to stand trial, plead guilty, or waive counsel. That coherent set of decisions should not be disturbed.

II. Petitioner Is Not Analogous to an Intellectually Disabled Person Who Is Categorically Exempt from the Death Penalty.

Perhaps in an effort to overcome the settled law discussed above, petitioner now appears to stake his incompetence claim not only on his inability to recall his crime, but more broadly on his dementia and attendant cognitive impairments. *Compare, e.g.*, Pet. iii (presenting the question whether the State may "execute a prisoner whose mental disability leaves him without memory of his commission of the capital offense"), *with* Pet'r Br. i (revising that question to ask whether the State "may execute a prisoner whose *vascular dementia and cognitive impairment* leaves him without memory of the commission of the capital offense *and* prevents him from having a rational understanding of the circumstances of his

scheduled execution" (emphases added)); *see also* Pet'r Br. 16 (arguing that States must "refrain from executing an individual whose verifiable cognitive impairments render him incompetent to rationally understand the circumstances surrounding a scheduled execution").

Relying on his overall medical condition, petitioner compares himself to persons with intellectual disability, who are exempt from the death penalty under *Atkins*. Pet'r Br. 11 n.5 (arguing that "[h]is functioning is thus akin to the functioning of an individual for whom the death penalty has been held to be categorically unavailable under the Eighth Amendment" (citing *Atkins*, 536 U.S. at 316)). Petitioner suggests that "age of onset is the only difference between an individual who is intellectually disabled, and therefore ineligible for the death penalty" under *Atkins* and "an individual who suffers from dementia." *Id.* at 27-28 n.17.[3]

As explained below, the *Atkins* analogy fails. Even if petitioner were correct that age of onset is the only difference between his condition and intellectual disability, that difference defeats his argument. The Court's reasons for holding that intellectually disabled persons are exempt from capital punishment do not apply to offenders like petitioner who acquired their mental impairments after being sentenced.

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[3] Petitioner's amici likewise appear to champion an *Atkins*-like categorical approach to offenders with dementia over application of the established rational-understanding test. *See* APA Amicus Br. 11 (arguing that "[t]he infirmities associated with vascular dementia, moreover, do not always map cleanly onto the concept of a 'rational understanding' of the reason for execution"), 12 (claiming that executing an individual with vascular dementia "offends humanitarian principles for additional reasons that are not strictly tied to the question of rational understanding").

A. In *Atkins*, the Court considered whether the execution of any person with intellectual disability (then called "mental retardation") was prohibited by the Eighth Amendment. 536 U.S. at 307. Then, as now, proof of intellectual disability required the presence of three characteristics: (1) significantly sub-average intellectual functioning; (2) significant limitations in adaptive skills; and (3) the onset of those two deficits before the age of 18. *Id.* at 308 n.3, 318; *accord Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017) (describing those "three core elements" of intellectual disability as "generally accepted").

To answer the Eighth Amendment question, the Court first surveyed state legislation addressing execution of the intellectually disabled and concluded that "a national consensus has developed against it." 536 U.S. at 316. Then, applying its "own judgment," *id.* at 313, the Court found that its death-penalty jurisprudence provided two reasons that confirmed the consensus that the intellectually disabled "should be categorically excluded from execution," *id.* at 318.

The first reason was that execution of persons with intellectual disability did not "measurably contribute[]" to either purpose served by the death penalty: "retribution and deterrence of capital crimes by prospective offenders." *Id.* at 319 (citations and internal quotation marks omitted).

As to retribution, "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Id.* The Court had already concluded that the mental impairments of the intellectually disabled—particularly their frequent impulsiveness and tendency to follow others—"diminish their personal culpability" for the crimes they commit. *Id.* at 318. If the intellectually disabled thus have "less[] culpability" than the average

murderer, the Court reasoned, they necessarily fall short of the culpability of that narrower class of persons whose "most serious crimes" are the only ones that merit the death penalty as retribution. *Id.* at 319.

And as to deterrence, the logic of capital sentencing is that "the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." *Id.* at 320. But the intellectually disabled's "cognitive and behavioral impairments," the Court explained, "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based on that information." *Id.*

The second jurisprudential reason for a categorical exemption was that persons with intellectual disability face "a special risk" that "'the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Id.* (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). That heightened risk arises from two factors. Some evidence pointed to the possibility that intellectually disabled persons may falsely confess to crimes. *Id.* Also, they may be less able "to make a persuasive showing of mitigation" due to their "typically poor" performance as witnesses and problems assisting counsel. *Id.* at 320-21.

B. The rationale of *Atkins* does not fit petitioner's situation. There is nothing close to a national legislative consensus against executing even those persons who had dementia or a similar mental illness *at the time of the crime*, much less those who did not become ill until after being sentenced. *See* Aurelie Tabuteau Mangels, *Should Individuals with Severe Mental Illness Continue to Be Eligible for the Death Penalty?*, 32 Crim. Just. 9, 13-14 (Fall 2017) (describing unenacted bills in eight States

that all require "significant impairments to the defendant's capacity at the time of the crime"). And every reason cited by the Court for exempting the intellectually disabled from the death penalty is tied to the presence of that disability before the crime, at the commission of the crime, or at trial. That is not the case with petitioner's dementia and attendant cognitive impairments.

Because petitioner did not have dementia when he murdered a police officer and attempted to murder his ex-girlfriend, his culpability for those crimes is in no way diminished by his current state. *See Allen v. Ornoski*, 435 F.3d 946, 951-52 (9th Cir. 2006) (rejecting argument to extend *Atkins* to prohibit execution of "the elderly and infirm" because "the Supreme Court's limitations on the use of the death penalty are grounded in the theory that some classes of persons are less culpable and therefore not deserving of the death penalty and Allen's age and infirmity do not render him less culpable at the time of his offenses"); *Bland v. State*, 164 P.3d 1076, 1079 (Okla. Crim. App. 2007) (rejecting argument that the Eighth Amendment bars execution of a terminally ill person because the "illness does not lessen his culpability for his crime"). Indeed, because petitioner was sane at the time of his offense and competent to stand trial, any doubt about his culpability has been conclusively resolved. Thus, the retributive purpose of petitioner's death sentence will still be served so long as he rationally understands it. *See Panetti*, 551 U.S. at 958-59.

For the same reason, executing someone who was suffering no cognitive impairment when he committed murder will deter other potential capital offenders in the same condition. They can understand the punishment of a person who was fully culpable at the time of the offense and control their conduct in response. *See Enmund v.*

Florida, 458 U.S. 782, 799 (1982) (indicating that capital punishment can deter those capable of "premeditation and deliberation" (citation and internal quotation marks omitted)).

Finally, because petitioner was not suffering dementia when he was charged and convicted, he faced no "special risks" of receiving the death penalty such as those discussed in *Atkins*. 536 U.S. at 320-21.

C. Petitioner's condition also does not warrant the sort of categorical exemption that applies to intellectual disability. "Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Indiana v. Edwards*, 554 U.S. 164, 175 (2008); *see also* APA Amicus Br. 7 ("As with any form of dementia, the symptoms of vascular dementia and the speed with which it progresses may vary."). Also, the definitions of mental illnesses themselves "are subject to flux and disagreement" and some diagnoses "may mask vigorous debate within the [medical] profession about the very contours of the mental disease itself." *Clark v. Arizona*, 548 U.S. 735, 752, 774 (2006).

The answer to that variability is not to stretch the *Atkins* tent on a case-by-case basis to see whether it covers by analogy a specific condition or a specific offender's symptoms. The solution is already in place: a prisoner claiming incompetence to be executed must show a lack of rational understanding of the punishment and the reason for it. *See Panetti*, 551 U.S. at 958-59. That petitioner failed to make that showing here—despite the benefit of expert assistance and an evidentiary hearing—is no reason to upset the Court's settled Eighth Amendment jurisprudence.

CONCLUSION

The judgment of the circuit court should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX A

STATE SUPREME COURT CASES ON THE EFFECT OF MEMORY LOSS ON COMPETENCE IN CRIMINAL TRIALS

Thompson v. State, 364 So. 2d 682, 682 (Ala. 1977) (disapproving a lower court's opinion that the defendant's memory loss made her presumptively incompetent to stand trial and explaining that the defendant's rational understanding was the dispositive issue)

Fajeriak v. State, 520 P.2d 795, 801 (Alaska 1974) ("[A]fter careful deliberation we have concluded that amnesia, be it partial or total, is not an adequate ground for a declaration of incompetency to stand trial.")

State v. Johnson, 536 P.2d 1035, 1036 (Ariz. 1975) (approving rule that "a presently rational person" should not be held incompetent to stand trial "merely because he asserts he cannot remember the events surrounding the crime")

Rector v. State, 638 S.W.2d 672, 673 (Ark. 1982) (holding that the trial court "correctly pointed out that amnesia is not an adequate ground for holding a defendant incompetent to stand trial")

People v. Jablonski, 126 P.3d 938, 962 (Cal. 2006) (rejecting argument that "memory impairment, in and of itself, establishes a mental disorder that renders a defendant incompetent [to stand trial]")

People v. Palmer, 31 P.3d 863, 869 (Colo. 2001) (holding that "amnesia, in and of itself, does not constitute incompetency [to stand trial]"), *superseded by statute on other grounds as stated in In re People ex rel. W.P.*, 295 P.3d 514, 524 n.10 (Colo. 2013)

State v. Gilbert, 640 A.2d 61, 65 (Conn. 1994) (agreeing that "'lack of memory per se'" does not control whether a defendant is competent to stand trial (quoting *Wilson v. United States*, 391 F.2d 460, 464 n.4 (D.C. Cir. 1968))

Parson v. State, 275 A.2d 777, 787 (Del. 1971) ("[I]t is clear that despite his claimed amnesia with respect to the actual commission of the crime, itself, Parson was competent to stand trial.")

Aldridge v. State, 274 S.E.2d 525, 530 (Ga. 1981) ("Amnesia does not, per se, constitute incompetency to stand trial.")

People v. Stahl, 10 N.E.3d 870, 880 (Ill. 2014) (holding that "amnesia as to the events surrounding the crime does not *per se* render a defendant unfit to stand trial")

Burr v. State, 367 N.E.2d 1085, 1086 (Ind. 1977) (reaffirming precedent that "an amnesiac defendant who understood the charges against him was competent to stand trial, notwithstanding his stated inability to remember the facts concerning the crime")

State v. Lyman, 776 N.W.2d 865, 874 (Iowa 2010) ("Amnesia on its own will not render a criminal defendant incompetent to stand trial."), *overruled in part on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 708 & n.3 (Iowa 2016)

State v. Owens, 807 P.2d 101, 106 (Kan. 1991) ("Amnesia alone should not supply the basis for declaring a defendant incompetent to stand trial.")

Commonwealth v. Griffin, 622 S.W.2d 214, 217 (Ky. 1981) ("We reject amnesia by virtue of mental disease or otherwise as a basis for declaring an accused incompetent to stand trial. This holding includes partial loss of memory or distorted memory of events at the time of commission of a crime.")

State v. Gray, 291 So. 2d 390, 392 (La. 1974) (rejecting argument that the defendant was incompetent to stand trial because "he had amnesia at the time of the commission of the offense and cannot remember what transpired")

Morrow v. State, 443 A.2d 108, 113 (Md. 1982) (holding that "amnesia, by itself, does not amount to incompetency [to stand trial]")

Commonwealth v. Lombardi, 393 N.E.2d 346, 348 (Mass. 1979) (agreeing with "[t]he virtually unanimous weight of authority in this country . . . that a defendant is not incompetent to stand trial simply because he is suffering from amnesia")

State v. Baumruk, 85 S.W.3d 644, 648 (Mo. 2002) ("Even if Baumruk did suffer from amnesia that affected his ability to recall the events surrounding the incident, amnesia does not bar prosecution of an otherwise competent defendant." (footnote omitted))

State v. Austad, 641 P.2d 1373, 1379 (Mont. 1982) (affirming finding that the defendant was competent to stand trial "despite his amnesia")

State v. Holtan, 287 N.W.2d 671, 676 (Neb. 1980) (per curiam) (holding that "the mere fact that the defendant maintains he does not recall committing the crime" did not require a hearing on his competency to enter a plea)

Desai v. Eighth Judicial Dist. Ct., No. 63046, 2013 WL 3324971, at *1 (Nev. Apr. 29, 2013) (order denying petition) (unpublished) (explaining that "amnesia alone would not be sufficient to require further competency proceedings or a finding at this point that [the defendant] is not competent to stand trial")

State v. Kincaid, 960 A.2d 711, 714 (N.H. 2008) (holding that "the defendant's claim of amnesia" "does not automatically raise a bona fide or legitimate doubt triggering a due process right to a competency hearing")

State v. Mabry, 630 P.2d 269, 274 (N.M. 1981) (affirming ruling that the defendant was competent to stand trial despite evidence of "psychological problems which affected his memory and his ability to recall the events in question")

People v. Francabandera, 310 N.E.2d 292, 296 (N.Y. 1974) (rejecting view that amnesia necessarily constitutes incapacity to stand trial and adopting a totality-of-the-circumstances test)

State v. Willard, 234 S.E.2d 587, 593 (N.C. 1977) (adopting rule that "amnesia does not per se render a defendant incapable of standing trial or of receiving a fair trial")

State v. Brooks, 495 N.E.2d 407, 413 (Ohio 1986) (per curiam) ("Assuming, *arguendo*, appellant does suffer from psychogenic amnesia, this fact alone would not render him incompetent to stand trial.")

Siah v. State, 837 P.2d 485, 487 (Okla. Crim. App. 1992) (holding that the defendant's "lack of memory of incidents surrounding the alleged crime" "is not, in and of itself, sufficient to support the claim of lack of competency to stand trial")

Commonwealth v. Barky, 383 A.2d 526, 528 (Pa. 1978) ("We do not believe that appellant's amnesia alone denied him either the effective assistance of counsel or the opportunity to present a defense.")

State v. Peabody, 611 A.2d 826, 833 (R.I. 1992) (holding that "amnesia, without more, does not per se render an accused incompetent to stand trial")

State v. Finklea, 697 S.E.2d 543, 546 (S.C. 2010) (concluding that a "bare assertion" of amnesia was not enough to overturn a finding that the defendant was competent to stand trial at the sentencing phase)

State v. Vassar, 279 N.W.2d 678, 683 (S.D. 1979) ("Loss of memory, however, regarding the facts of the event for which the accused is charged does not, standing alone, necessarily . . . preclude mental competency as a matter of law."), *overruled in part on other grounds by State v. Waff*, 373 N.W.2d 18, 22 (S.D. 1985)

Morris v. State, 301 S.W.3d 281, 293 (Tex. Crim. App. 2009) (rejecting a "*per se* rule" that amnesia constitutes mental incapacity to stand trial)

State v. Harris, 789 P.2d 60, 65 (Wash. 1990) ("Nor does inability to recall past events necessarily constitute incompetence [to stand trial].")

APPENDIX B

STATE INTERMEDIATE COURT CASES ON THE EFFECT OF MEMORY LOSS ON COMPETENCE IN CRIMINAL TRIALS

Robbins v. State, 312 So. 2d 243, 245 (Fla. Dist. Ct. App. 1975) (holding that "the amnesia of a defendant does not, per se, render him incapable of standing trial")

State v. Madden, 33 P.3d 549, 566 (Haw. Ct. App. 2001) (approving "the well-accepted principle that a loss of memory of the alleged offense does not in and of itself preclude fitness to proceed" to trial)

People v. Stolze, 299 N.W.2d 61, 62-63 (Mich. Ct. App. 1980) (approving cases holding that amnesia does not per se render a defendant incompetent to stand trial)

State v. Hulin, 412 N.W.2d 333, 338 (Minn. Ct. App. 1987) (disagreeing that the defendant was incompetent "because he had lost most memory of the offense" and reasoning that "amnesia regarding the events surrounding the offense is not itself a bar to prosecution")

Patterson v. State, 127 So. 3d 1124, 1132-34 (Miss. Ct. App. 2013) (affirming finding that the defendant was competent to stand trial despite his inability to recall the murder)

State v. Pugh, 283 A.2d 537, 542 (N.J. Super. Ct. App. Div. 1971) ("Even if in fact defendant did not remember the details of the crime, he would still be competent to stand trial.")

State v. Leming, 3 S.W.3d 7, 16 (Tenn. Crim. App. 1998) ("[W]e first begin with the principle that amnesia, in and of itself, does not constitute incompetency to stand trial.")

York v. Shulsen, 875 P.2d 590, 597 (Utah Ct. App. 1994) (holding that "a defendant with amnesia is not per se incompetent to plead guilty")

Addison v. Commonwealth, No. 2234-96-3, 1997 WL 557012, at *5 (Va. Ct. App. Sept. 9, 1997) (unpublished) ("We also note that Addison's claims that he could not remember the shooting and that he blacked out are insufficient evidence to establish as a matter of law that Addison was incompetent to stand trial.")